

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Gloria L. Franklin
Clerk of Court

San Francisco Bankruptcy Court
235 Pine St.
P.O. Box 7341
San Francisco, CA 94120-7341

(415) 268-2300

Richard W. Wieking, Clerk
United States District Court
450 Golden Gate Avenue
San Francisco, CA 94102-3489

FILED

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AM 11:45

FILED

JAN - 8 2008

UNITED STATES BANKRUPTCY COURT
SAN FRANCISCO, CA

Adversary Proceeding
07-3104 TC Thomas E. Carlson

Re: Yugen Kaisha Y.K.F. vs Dodson

CV 08

0225^{SC}

Dear Mr. Wieking:

[X] Enclosed please find a copy of the Order Certification For Withdrawal of Reference and Assignment To District Judge (Bankruptcy Local Rule 9015(2)(b). Included is a certified copy of the docket sheet and documents regarding subject matter counterclaim.

Please acknowledge receipt of this appeal by stamping the district court case number on a copy of this letter and return it to *United States Bankruptcy Court, San Francisco Division*.

Gloria L. Franklin, Clerk
United States Bankruptcy Court

Dated: January 8, 2008

By: ANNA CHO-WONG
Deputy Clerk Anna Cho-Wong

**U.S. Bankruptcy Court
Northern District of California (San Francisco)
Adversary Proceeding #: 07-03104
Internal Use Only**

Assigned to: Judge Thomas E. Carlson
Related BK Case: 05-32929
Related BK Title: Alexander N. Popov
Related BK Chapter: 7
Demand:

Date Filed: 09/05/07



Nature[s] of Suit: 13 Recovery of money/property - 548 fraudulent transfer
14 Recovery of money/property - other
72 Injunctive relief - other

CV 08 0225 SC

Plaintiff

Yugen Kaisha Y.K.F.
c/o Brian Baymiller
Fiji Silysia Chemical Ltd.
P.O. Box 14434
Research Triangle Park, NC 27709-4434

represented by **James S. Monroe**
Law Offices of Nixon Peabody
1 Embarcadero Center #1800
San Francisco, CA 94111-3996
(415) 984-8200
Email: jmonroe@nixonpeabody.com
LEAD ATTORNEY

V.

Defendant

Stephanie Dodson
2032 Donald Drive
Moraga, CA 94556

represented by **Joel K. Belway**
Law Offices of Joel K. Belway
235 Montgomery St. #668
San Francisco, CA 94104
(415) 788-1702
Email: belwaypc@pacbell.net

Intervenor-Plaintiff

Martin Triano
Law Offices of Martin F. Triano
25 Jessie Street
San Francisco, CA 94105
415-371-8000

represented by **Mark D. Byrne**
Law Offices of Martin F. Triano
25 Jessie St. 16th Fl.
San Francisco, CA 94105
(415)371-8000
Email: mailbox@martinftriano.com

Counter-Claimant

Stephanie Dodson
2032 Donald Drive
Moraga, CA 94556

represented by **Joel K. Belway**
(See above for address)

V.

Counter-Defendant

**UNITED STATES BANKRUPTCY COURT
Northern District of California**
I certify that this is a true, correct and full copy
of the original document on file in my custody.
Dated 1-8-08
by Ann Cho-Wang
Deputy Clerk

Yugen Kaisha Y.K.F.
 c/o Brian Baymiller
 Fiji Silysia Chemical Ltd.
 P.O. Box 14434
 Research Triangle Park, NC 27709-4434

| Filing Date | # | Docket Text |
|-------------|-----------|--|
| 09/05/2007 | <u>1</u> | Adversary case 07-03104. 13 (Recovery of money/property - 548 fraudulent transfer), 14 (Recovery of money/property - other), 72 (Injunctive relief - other) Complaint by Yugen Kaisha Y.K.F., c/o Brian Baymiller, Fiji Silysia Chemical Ltd. against Stephanie Dodson. Fee Amount \$250. (Attachments: # <u>1</u> AP Cover Sheet # <u>2</u> Summons to be Issued) (Monroe, James) (Entered: 09/05/2007) |
| 09/05/2007 | | Receipt of filing fee for Complaint(07-03104) [cmp,cmp] (250.00). Receipt number 4594977, amount \$ 250.00 (U.S. Treasury) (Entered: 09/05/2007) |
| 09/06/2007 | <u>2</u> | Order Regarding Initial Disclosures and Discovery Conference . (ac,) (Entered: 09/06/2007) |
| 09/06/2007 | <u>2</u> | **CORRECTIVE ENTRY** Court corrected plaintiff's name. (RE: related document(s) <u>1</u> Complaint filed by Plaintiff Yugen Kaisha Y.K.F.). (ac,) (Entered: 09/06/2007) |
| 09/06/2007 | <u>3</u> | Summons Issued on Stephanie Dodson Answer Due 10/9/2007. Status Conference to be held on 11/15/2007 at 10:00 AM at San Francisco Courtroom 23 - Carlson. (ac,) (Entered: 09/06/2007) |
| 09/11/2007 | <u>4</u> | Summons Service Executed on Stephanie Dodson 9/7/2007 . (Monroe, James) (Entered: 09/11/2007) |
| 10/09/2007 | <u>5</u> | Stipulation, To Extend Time for Defendant Stephanie Dodson to Answer the Complaint Filed by Plaintiff Yugen Kaisha Y.K.F.. (Monroe, James) (Entered: 10/09/2007) |
| 10/23/2007 | <u>6</u> | Answer to Complaint , Counterclaim by Stephanie Dodson against all plaintiffs <i>and Demand for Jury Trial</i> Filed by Stephanie Dodson. (Belway, Joel) (Entered: 10/23/2007) |
| 11/14/2007 | <u>7</u> | Document: <i>Joint Discovery Plan [FRBP 7026(A) and FRCP 26(A)] [PROPOSED]</i> .. Filed by Plaintiff Yugen Kaisha Y.K.F. (Monroe, James) (Entered: 11/14/2007) |
| 11/14/2007 | <u>8</u> | <i>Motion of Yugen Kaisha, Y.K.F. to Dismiss Counterclaim for Lack of Subject Matter Jurisdiction</i> Filed by Plaintiff Yugen Kaisha Y.K.F.. (Monroe, James) (Entered: 11/14/2007) |
| 11/14/2007 | <u>9</u> | Notice of Hearing <i>on Motion of Yugen Kaisha, Y.K.F. to Dismiss Counterclaim for Lack of Subject Matter Jurisdiction</i> (RE: related document(s) <u>8</u> Motion Miscellaneous Relief filed by Counter-Defendant Yugen Kaisha Y.K.F., Plaintiff Yugen Kaisha Y.K.F.). Hearing scheduled for 12/21/2007 at 09:30 AM at San Francisco Courtroom 23 - Carlson. Filed by Plaintiff Yugen Kaisha Y.K.F.. (Monroe, James) (Entered: 11/14/2007) |
| 11/14/2007 | <u>10</u> | Declaration of James S. Monroe in in Support of Motion of Yugen Kaisha, Y.K.F. to Dismiss Counterclaim for Lack of Subject Matter Jurisdiction of (RE: related document(s) <u>8</u> Motion Miscellaneous Relief). Filed by Plaintiff Yugen Kaisha Y.K.F. (Monroe, James) (Entered: 11/14/2007) |
| 11/14/2007 | <u>11</u> | Certificate of Service (RE: related document(s) <u>8</u> Motion Miscellaneous Relief). Filed by Plaintiff Yugen Kaisha Y.K.F. (Monroe, James) (Entered: 11/14/2007) |
| 11/15/2007 | <u>1</u> | Courtroom Hearing Continued (RE: Summons Issued - related document(s) <u>3</u>) (Continued to 12/21/2007 09:30 AM at San Francisco Courtroom 23 - Carlson) (Hearing Held. All matters are Stayed pending 12/21/07 hearing on Motion to Dismiss for Lack of Jurisdiction and continued |

Status Conference.)(ba,) (Entered: 11/15/2007)

- 11/15/2007 12 Motion to Intervene Filed by Intervenor-Plaintiff Martin Triano. (Attachments: # 1 Notice of Hearing# 2 Memorandum of Points and Authorities # 3 Declaration of Mark D. Byrne in Support of Motion# 4 Exhibit A-B In Support of Motion# 5 Exhibit C-J in Support of Motion# 6 Exhibit K-Q in Support of Motion# 7 Certificate of Service) (Byrne, Mark) (Entered: 11/15/2007)

- 11/16/2007 12 Hearing Set On (RE: related document(s)12 Motion to Intervene Filed by Intervenor-Plaintiff Martin Triano. (Attachments: # (1) Notice of Hearing# (2) Memorandum of Points and Authorities # (3) Declaration of Mark D. Byrne in Support of Motion# (4) Exhibit A-B In Support of Motion# (5) Exhibit C-J in Support of Motion# (6) Exhibit K-Q in Support of Motion# (7) Certificate of Service) (Byrne, Mark)). Hearing scheduled for 12/14/2007 at 09:30 AM at San Francisco Courtroom 23 - Carlson. (ac,) (Entered: 11/16/2007)

- 11/16/2007 12 ****CORRECTIVE ENTRY**** Hearing not set for motion, court set hearing. (RE: related document(s)12 Motion to Intervene filed by Intervenor-Plaintiff Martin Triano). (ac,) (Entered: 11/16/2007)

- 11/27/2007 13 Motion to Amend *Answer and to Compel Plaintiff to Furnish Security for Costs* Filed by Defendant Stephanie Dodson. (Belway, Joel) (Entered: 11/27/2007)

- 11/27/2007 14 Declaration of Joel K. Belway in support of (RE: related document(s)13 Motion to Amend). Filed by Defendant Stephanie Dodson (Belway, Joel) (Entered: 11/27/2007)

- 11/29/2007 13 Hearing Set On (RE: related document(s)13 Motion to Amend *Answer and to Compel Plaintiff to Furnish Security for Costs* Filed by Defendant Stephanie Dodson. (Belway, Joel)). Hearing scheduled for 12/21/2007 at 09:30 AM at San Francisco Courtroom 23 - Carlson. (ac,) (Entered: 11/29/2007)

- 11/29/2007 13 ****CORRECTIVE ENTRY**** Court set hearing for motion. (RE: related document(s)13 Motion to Amend filed by Counter-Claimant Stephanie Dodson, Defendant Stephanie Dodson). (ac,) (Entered: 11/29/2007)

- 11/30/2007 15 Brief/Memorandum in Opposition to *Opposition of Yugen Kaisha, Y.K.F. to Motion for Intervention by Martin F. Triano* (RE: related document(s)12 Motion to Intervene,). Filed by Plaintiff Yugen Kaisha Y.K.F. (Monroe, James) (Entered: 11/30/2007)

- 12/02/2007 16 Statement of Non-Opposition to Motion to Intervene (RE: related document(s)12 Motion to Intervene,). Filed by Defendant Stephanie Dodson (Belway, Joel) (Entered: 12/02/2007)

- 12/07/2007 17 Reply to *YKF's Opposition to Motion to Intervene* (RE: related document(s)12 Motion to Intervene,). Filed by Intervenor-Plaintiff Martin Triano (Attachments: # 1 Certificate of Service) (Byrne, Mark) (Entered: 12/07/2007)

- 12/07/2007 18 Brief/Memorandum in Opposition to *Motion to Dismiss Counterclaim* (RE: related document(s)8 Motion Miscellaneous Relief). Filed by Counter-Claimant Stephanie Dodson (Belway, Joel) (Entered: 12/07/2007)

- 12/11/2007 19 Brief/Memorandum in Opposition to *Yugen Kaisha, Y.K.F.'s Opposition to Defendant's Motion to Compel Plaintiff to Furnish Security For Costs, and Response to Motion to Amend Answer* (RE: related document(s)13 Motion to Amend). Filed by Plaintiff Yugen Kaisha Y.K.F. (Monroe, James) (Entered: 12/11/2007)

- 12/14/2007 20 Reply to *Defendant's Opposition to Plaintiff's Motion to Dismiss Counterclaim for Lack of Subject Matter Jurisdiction* (RE: related document(s)8 Motion Miscellaneous Relief). Filed by Plaintiff Yugen Kaisha Y.K.F. (Monroe, James) (Entered: 12/14/2007)

| | | |
|------------|----|--|
| 12/17/2007 | 21 | Reply to <i>Opposition to Motion to Amend Answer and to Compel Plaintiff to Furnish Security for Costs</i> (RE: related document(s) <u>13</u> Motion to Amend). Filed by Defendant Stephanie Dodson (Attachments: # <u>1</u> Exhibit Transcript of Findings of Fact and Conclusions of Law in A.P. 05-3485) (Belway, Joel) (Entered: 12/17/2007) |
| 12/20/2007 | 22 | Intervenor's Notice of Continued Hearing (RE: related document(s) <u>8</u> Motion Miscellaneous Relief filed by Counter-Defendant Yugen Kaisha Y.K.F., Plaintiff Yugen Kaisha Y.K.F., <u>3</u> Summons Issued, <u>13</u> Motion to Amend filed by Counter-Claimant Stephanie Dodson, Defendant Stephanie Dodson). Status Conference to be held on 1/7/2008 at 9:30 AM San Francisco Courtroom 23 - Carlson for <u>3</u> , Hearing to be held on 1/7/2008 at 9:30 AM San Francisco Courtroom 23 - Carlson for <u>8</u> , Hearing to be held on 1/7/2008 at 9:30 AM San Francisco Courtroom 23 - Carlson for <u>13</u> , Filed by Intervenor-Plaintiff Martin Triano. (Attachments: # <u>1</u> Certificate of Service) (Byrne, Mark) (Entered: 12/20/2007) |
| 01/04/2008 | 23 | Tentative Ruling regarding (1) Yugen Kaisha, Y.K.F.'s motion to dismiss counterclaim and (2) Martin Triano's motion to intervene (RE: related document(s) <u>8</u> Motion Miscellaneous Relief filed by Counter-Defendant Yugen Kaisha Y.K.F., Plaintiff Yugen Kaisha Y.K.F., <u>12</u> Motion to Intervene filed by Intervenor-Plaintiff Martin Triano). (ac,) (Entered: 01/04/2008) |
| 01/07/2008 | | Courtroom Hearing Continued (RE: Motion to Amend - related document(s) <u>13</u>) (Continued to 1/14/2008 09:30 AM at San Francisco Courtroom 23 - Carlson) (gh,) (Entered: 01/07/2008) |
| 01/07/2008 | | Courtroom Hearing Continued (RE: Motion Miscellaneous Relief - related document(s) <u>8</u>) (Continued to 1/14/2008 09:30 AM at San Francisco Courtroom 23 - Carlson) (gh,) (Entered: 01/07/2008) |
| 01/07/2008 | 24 | Certification for withdrawal of reference and assignment to District Judge(Bankruptcy Local Rule 9015(2)(b)(RE: related document(s) <u>8</u> Motion Miscellaneous Relief filed by Counter-Defendant Yugen Kaisha Y.K.F., Plaintiff Yugen Kaisha Y.K.F., <u>23</u> Order). (ac,) (Entered: 01/08/2008) |
| 01/08/2008 | 25 | Transmittal to District Court re Order Certification For Withdrawal of Reference and Assignment To District Judge (Bankruptcy Local Rule 9015(2)(b). (RE: related document(s) <u>24</u> Order). (ac,) (Entered: 01/08/2008) |



Entered on Docket
January 08, 2008
GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



Signed and Filed: January 07, 2008

UNITED STATES BANKRUPTCY COURT
Northern District of California

I certify that this is a true, correct and full copy
of the original document on file in my custody.

Dated 1/8/08
by Alexander N. Popov
Deputy Clerk

Thomas E. Carlson
THOMAS E. CARLSON
U.S. Bankruptcy Judge

CV 08

0225

SC

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | | |
|----------------------|---|---------------------------|
| In re |) | Case No. 05-32929 TEC |
| ALEXANDER N. POPOV, |) | |
| |) | Chapter 7 |
| Debtor. |) | |
| YUGEN KAISHA Y.K.F., |) | |
| Plaintiff, |) | |
| vs. |) | Adv. Proc. No. 07-3104 TC |
| STEPHANIE DODSON, |) | |
| Defendant. |) | |
| STEPHANIE DODSON, |) | |
| Counter-Claimant, |) | |
| vs. |) | |
| YUGEN KAISHA Y.K.F., |) | |
| Counter-Defendant. |) | |

CERTIFICATION FOR WITHDRAWAL OF REFERENCE AND ASSIGNMENT TO
DISTRICT JUDGE (BANKRUPTCY LOCAL RULE 9015(2)(b))

Plaintiff filed an action to set aside a fraudulent conveyance
under 11 U.S.C. §§ 544(b) and 548. Defendant filed a counterclaim
asserting a breach of contract on which she properly demanded trial

CERTIFICATION FOR WITHDRAWAL
OF REFERENCE

1 by jury. Defendant does not consent to trial by jury before the
2 bankruptcy court. It appears that this court has subject-matter
3 jurisdiction over the counterclaim, and that the counterclaim
4 should not be dismissed. It appears further that the claim and
5 counterclaim will involve consideration and proof regarding many of
6 the same facts, and that judicial economy would be furthered by
7 trying them in a single action.

8 The court therefore certifies that the reference should be
9 withdrawn and the action assigned to a District Judge pursuant to
10 Bankruptcy Local Rule 9015-2(b).

11 The court does not address whether the motion to intervene by
12 Martin Triano should be granted.

13 ****END OF CERTIFICATION****
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CERTIFICATION FOR WITHDRAWAL
OF REFERENCE

Court Service List

James S. Monroe, Esq.
Law Offices of Nixon Peabody
1 Embarcadero Center #1800
San Francisco, CA 94111-3996

Joel K. Belway, Esq.
Law Offices of Joel K. Belway
235 Montgomery St. #668
San Francisco, CA 94104

Mark D. Byrne, Esq.
Law Offices of Martin F. Triano
25 Jessie St. 16th Fl.
San Francisco, CA 94105

JOEL K. BELWAY [60556]
THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation
235 Montgomery Street, Suite 668
San Francisco, California 94104
Telephone: 415-788-1702
Facsimile: 415-788-1517

Attorney for Defendant
and Counterclaimant
STEPHANIE DODSON

CV 08

0225^{SC}

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

| | |
|----------------------|--------------------------------|
| In re: |) Case No. 05-32929 |
| |) |
| ALEXANDER N. POPOV, |) Chapter 7 |
| |) |
| Debtor. |) |
| |) |
| |) A.P. No. 07-03104 |
| YUGEN KAISAH, Y.K.F. |) |
| |) ANSWER TO COMPLAINT TO AVOID |
| Plaintiff, |) AND RECOVER FRAUDULENT |
| vs. |) TRANSFER AND FOR INJUNCTIVE |
| |) RELIEF, COUNTERCLAIM AND |
| STEPHANIE DODSON, |) DEMAND FOR JURY TRIAL |
| |) |
| Defendant. |) |
| |) |
| |) |
| STEPHANIE DODSON, |) |
| Counterclaimant, |) |
| vs. |) |
| |) |
| YUGEN KAISAH, Y.K.F. |) |
| |) |
| Claimant. |) |
| |) |

COMES NOW defendant, STEPHANIE DODSON ("Defendant"), and in
answer to the Complaint to Avoid and Recover Fraudulent Transfer

and for Injunctive Relief ("Complaint") of plaintiff, YUGEN
1 KAISHA, Y.K.F. ("Plaintiff"), admits, denies and alleges as
2 follows:

3 **JURISDICTION AND VENUE**

4 1. Defendant denies the allegations of paragraph 1 of the
5 Complaint.

6 2. Defendant denies the allegations of paragraph 2 of the
7 Complaint.

8 3. Defendant denies the allegations of paragraph 3 of the
9 Complaint.

10 4. Defendant denies the allegations of paragraph 4 of the
11 Complaint.

12 **PARTIES AND BACKGROUND FACTS**

13 5. Defendant admits the allegations of paragraph 5.

14 6. Defendant admits the allegations of paragraph 6.

15 7. Answering paragraph 7, Defendant admits and alleges that
16 Alexander Popov ("Debtor") once owned 3,744,000 shares of common
17 stock ("Shares") of Smart Alec's Intelligent Food, Inc. ("Smart
18 Alec's") but transferred his residual interest in the Shares to
19 Defendant on April 18, 2004 pursuant to that certain Share
20 Purchase Agreement between Debtor and Defendant (the "Agreement")
21 dated April 18, 2004. Except as expressly admitted, Defendant
22 denies the allegations of paragraph 7.

23 8. Defendant admits the allegations of paragraph 8.

9. Defendant denies the allegations of paragraph 9, and alleges that this Court found at trial in Triano v. Popov, A.P. No. 05-3485 (the "Triano Adversary Proceeding") that Debtor transferred his residual interest in the Shares to Defendant on April 18, 2004. The Court's findings in the Triano Adversary Proceeding are incorporated herein by reference.

10. Defendant admits the allegations of paragraph 10.

11. Defendant lacks sufficient information or belief to answer the allegations of paragraph 11 of the Complaint, and upon such grounds denies such allegations.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

(Avoidance and Recovery of Fraudulent Transfer under Bankruptcy Code §584(a)(1)(A))

12. Answering paragraph 12 of the Complaint, Defendant repeats and incorporates by reference each admission, denial, and allegation contained in paragraphs 1 through 11 of this Answer as though set forth at length herein.

13. Answering paragraph 13 of the Complaint, Defendant admits and alleges that Debtor transferred his residual interest in the Shares to Defendant for \$12,500 on April 18, 2004, as found by the Court at trial in the Triano Adversary Proceeding. Except as expressly admitted, Defendant denies the allegations of paragraph 13.

14. Defendant denies the allegations of paragraph 14.

15. Defendant denies the allegations of paragraph 15.

16. Answering paragraph 16 of the Complaint, Defendant
1 admits and alleges that she and Debtor executed the Agreement on
2 April 18, 2004 and that a true and correct copy of the Agreement
3 is attached as Exhibit 3 to the Complaint. Except as expressly
4 admitted, Defendant denies the allegations of paragraph 16.

5 17. Defendant denies the allegations of paragraph 17.

6 18. Defendant admits the allegations of paragraph 18.

7 19. Defendant denies the allegations of paragraph 19.

8 20. Defendant denies the allegations of paragraph 20.

9
10 **SECOND CAUSE OF ACTION**

11 **(Avoidance and Recovery of Fraudulent Transfer Under Bankruptcy**
12 **Code §544(b)(1) and California Civil Code §3439.04(a)(1))**

13 21. Answering paragraph 21 of the Complaint, Defendant
14 repeats and incorporates by reference each admission, denial, and
15 allegation contained in paragraphs 1 through 20 of this Answer as
16 though set forth at length herein.

17 22. Defendant denies the allegations of paragraph 22.

18 **THIRD CAUSE OF ACTION**

19 **(Avoidance and Recovery of Fraudulent Transfer Under Bankruptcy**
20 **Code §548(a)(1)(B))**

21 23. Answering paragraph 23, Defendant repeats and
22 incorporates by reference each admission, denial and allegation
23 set forth in paragraphs 1-13, 17, 18, and 20 of this Answer as
24 though fully set forth herein.

25 24. Answering paragraph 24, Defendant admits and alleges
26 that the transfer of Debtor's residual interest in the Shares to
27 Defendant under the Agreement was to or for the benefit
28

of Defendant and Debtor. Except as expressly admitted, Defendant
1 denies the allegations of paragraph 24.

2 25. Defendant denies the allegations of paragraph 25.

3 26. Defendant denies the allegations of paragraph 26.

4 **FOURTH CAUSE OF ACTION**

5 **(Avoidance and Recovery of Fraudulent Transfer Under Bankruptcy**
6 **Code §544(b)(1) and California Civil Code §3439.05)**

7 27. Answering paragraph 23, Defendant repeats and
8 incorporates by reference each admission, denial and allegation
9 set forth in paragraphs 1-13, 17, 18, 20, and 24-26 of this
10 Answer as though fully set forth herein.

11 28. Defendant denies the allegations of paragraph 28.

12 29. Defendant denies the allegations of paragraph 29.

13 **FIFTH CAUSE OF ACTION**

14 **(Injunctive Relief under Rule 7065 of the Federal Rules of**
15 **Bankruptcy Procedure and California Civil Code §3439.07)**

16 30. Answering paragraph 30, Defendant repeats and
17 incorporates by reference each admission, denial and allegation
18 set forth in paragraphs 1-29 of this Answer.

19 31. Answering paragraph 31, Defendant admits and alleges
20 that there is no legal ground to prevent her from transferring
21 the Shares. Except as expressly admitted, Defendant denies the
22 allegations of paragraph 31.

23 32. Defendant denies the allegations of paragraph 32.

24 **FIRST AFFIRMATIVE DEFENSE**

25 The Complaint and each claim therein fail to state a claim
26 against Defendant upon which relief can be granted.
27
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SECOND AFFIRMATIVE DEFENSE

1 The Court lacks jurisdiction over the claims asserted in the
2 Complaint.

3 **THIRD AFFIRMATIVE DEFENSE**

4 The Complaint and each claim therein are barred by the
5 unclean hands of the Plaintiff.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 The claims by Plaintiff are subject to offset and
8 recoupment.

9 **FIFTH AFFIRMATIVE DEFENSE**

10 The Plaintiff lacks standing in this Court to assert the
11 claims of the Complaint.

12 WHEREFORE, Defendant prays for judgment as follows:

13 1. That Plaintiff take nothing and for judgment in favor of
14 Defendant;

15 2. For costs of suit;

16 3. For reasonable attorneys fees to the extent allowed by
17 law; and

18 4. Such other and further relief as the Court may deem meet
19 in the premises.

20 Dated: October 23, 2007

21 THE LAW OFFICE OF JOEL K. BELWAY
22 Professional Corporation

23 /s/ Joel K. Belway

24 JOEL K. BELWAY

25 Attorney for Defendant

26 Stephanie Dodson
27
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DEMAND FOR JURY

1 Defendant Stephanie Dodson hereby demands trial by jury.

2
3 Dated: October 23, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

4
5 /s/ Joel K. Belway
6 JOEL K. BELWAY
7 Attorney for Defendant
8 Stephanie Dodson

9 **COUNTERCLAIM**

10 1. Counterclaimant, Stephanie Dodson ("Counterclaimant"),
11 and counterdefendant, Yugen Kaisha, Y.K.F. ("Counterdefendant"),
12 were parties to that certain Closing Agreement re Payoff of
13 Secured Redemption Promissory Note dated March 12, 2007 ("Closing
14 Agreement") under which Counterclaimant paid off the balance of
15 certain obligations of Smart Alec's and Debtor to
16 Counterdefendant under agreements referred to in the Closing
17 Agreement, and herein, as the Settlement Documents.

18 2. The transaction between Counterclaimant and
19 Counterdefendant that closed under the Closing Agreement
20 involved, *inter alia*, a redemption of the Shares in consideration
21 for the payment of certain obligations of Smart Alec's and Debtor
22 to the Counterdefendant.

23 3. In or about the summer of 2006 Counterclaimant sought
24 to pay any sums owed to Counterdefendant under the Settlement
25 Documents. Counterclaimant is informed and believes and thereon
26 alleges that Counterdefendant, in bad faith, delayed and stalled
27
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a closing of the transaction that closed under the Closing Agreement, causing Counterclaimant to pay approximately \$90,000, according to proof, more than she would have had to pay had Counterdefendant acted in good faith and closed the transaction when Counterclaimant originally sought to close.

4. Counterclaimant is informed and believes and thereon alleges that Counterdefendant's actions constituted a bad faith breach of contract, entitling Counterclaimant to general, special and punitive damages, according to proof.

WHEREFORE, Counterclaimant prays for judgment as follows:

1. For judgment in favor of Counterclaimant and against Counterdefendant for general, special and punitive damages, according to proof at trial;

2. Costs of suit incurred herein;

3. Attorneys fees to the extent allowed by law;

4. Such other and further relief as the Court may deem meet in the premises.

Dated: October 23, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

/s/ Joel K. Belway
JOEL K. BELWAY
Attorney for Counterclaimant
Stephanie Dodson

DEMAND FOR JURY

Counterclaimant Stephanie Dodson hereby demands trial by jury.

Dated: October 23, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

/s/ Joel K. Belway
JOEL K. BELWAY
Attorney for Counterclaimant
Stephanie Dodson

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DECLARATION OF SERVICE

1 I am over the age of eighteen years and not a party to the
2 within action. On October 23, 2007, I served the attached **Answer**
3 **to Complaint to Avoid and Recover Fraudulent Transfer and for**
4 **Injunctive Relief, Counterclaim and Demand for Jury Trial** on the
5 interested parties in this action by placing true copies thereof
6 in sealed envelopes and transmitting said envelopes to the
7 following addresses by the means indicated:
8

9 Via First-Class U.S. Mail

10 James S. Monroe, Esq.
11 Gregory E. Schopf, Esq.
12 NIXON PEABODY LLP
13 One Embarcadero Center, Suite 1800
14 San Francisco, CA 94111-3996

15 U.S. Trustee
16 235 Pine Street, Suite 850
17 San Francisco, CA 94104

18 I declare under penalty of perjury that the foregoing is
19 true and correct. Executed on October 23, 2007, at San
20 Francisco, California.

21 \s\ Joel K. Belway
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1 James S. Monroe, Esq. (State Bar Number: 102328)
2 Gregory E. Schopf (State Bar Number: 122862)
3 NIXON PEABODY LLP
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5 San Francisco, CA 94111-3996
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9 Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

CV 08

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10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 In re:

14 ALEXANDER N. POPOV,

15 Debtor.

Case No. 05-32929

Chapter 7

16 YUGEN KAISHA, Y.K.F.,

17 Plaintiff,

18 v.

19 STEPHANIE DODSON,

20 Defendant.

Adv. Pro. No.: 07-03104

**MOTION OF YUGEN KAISHA, Y.K.F. TO
DISMISS COUNTERCLAIM FOR LACK
OF SUBJECT MATTER JURISDICTION**

Hearing

21 Date: December 21, 2007
22 Time: 9:30 a.m.
23 Place: Courtroom 23
24 Judge: Hon. Thomas E. Carlson

Introduction and Summary of Relief Requested

25 Yugen Kaisha, Y.K.F. ("YKF"), plaintiff in the above-captioned action, hereby submits this
26 motion pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(1) of the
27 Federal Rules of Civil Procedure for dismissal of the counterclaim filed herein by defendant
28 Stephanie Dodson ("Dodson") for lack of subject matter jurisdiction on the grounds that there is no

8

1 independent jurisdictional basis for the counterclaim under 28 U.S.C. §1334(b) and it falls outside the
2 court's supplemental jurisdiction under 28 U.S.C. §1367(a).

3 YKF's complaint seeks to avoid and recover the debtor's prepetition transfer of 3,774,000
4 shares of common stock (the "Debtor's Shares") of Smart Alec's Intelligent Food, Inc., a California
5 corporation ("Smart Alec's") to Dodson as a fraudulent conveyance. YKF has the right to pursue this
6 avoidance action pursuant to an assignment agreement entered into with the Chapter 7 Trustee of the
7 debtor's bankruptcy estate which was authorized and approved by order entered herein on July 31,
8 2007. YKF maintains that the Debtor's Shares were transferred to Dodson shortly before the
9 September 6, 2005 petition date with the actual intent to hinder, delay or defraud the debtor's
10 creditors by removing said shares from the bankruptcy estate and thereby retaining control of Smart
11 Alec's to the exclusion of the debtor's creditors.

12 Dodson's counterclaim alleges a state law based contract claim regarding a Stock Redemption
13 Agreement, dated February 6, 2004, between Smart Alec's and YKF, whereby Smart Alec's agreed
14 to repurchase YKF's 1,440,000 shares of common stock of Smart Alec's (the "YKF Shares"). This
15 Stock Redemption Agreement was entered into as part of a Settlement Agreement entered into
16 between YKF, the debtor, Smart Alec's and Dodson, to settle a lawsuit filed by YKF regarding a
17 dispute concerning the accounting and management of Smart Alec's and the use of the funds YKF
18 invested in Smart Alec's to purchase the YKF Shares. Pursuant to the Settlement Agreement and
19 Stock Redemption Agreement, Smart Alec's agreed to repurchase the YKF Shares for \$775,000 as
20 provided therein. On March 12, 2007, the balance due under the Stock Redemption Agreement was
21 paid to YKF and the YKF Shares were transferred to Smart Alec's. Monroe Dec., ¶¶ 2-3.

22 By her counterclaim herein, Dodson alleges that YKF in some unexplained way delayed the
23 payoff of the amount due under the Stock Redemption Agreement, causing additional amounts to
24 have to be paid at the closing, and based thereon, seeks money damages from YKF. YKF denies this
25 allegation, but the truth or falsity thereof is immaterial to this motion.

Argument

A bankruptcy court has subject matter jurisdiction to adjudicate a counterclaim in an adversary proceeding only if there is an independent jurisdictional basis for the counterclaim as provided by 28 U.S.C. §1334(b) or it falls within the court's supplemental jurisdiction under 28 U.S.C. §1367(a).

Pursuant to 28 U.S.C. §1334(b), the bankruptcy court has jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." Dodson's counterclaim does not fall within any of these categories since it is based solely upon state law, exists apart from the bankruptcy case, and does not involve the debtor or the debtor's estate or have any conceivable potential impact on the bankruptcy estate. The counterclaim seeks money damages on behalf of Dodson only against YKF only. Accordingly, this dispute is not within the statutory grant of bankruptcy jurisdiction.

Likewise, Dodson's counterclaim is not within the bankruptcy court's supplemental jurisdiction under 28 U.S.C. §1367(a) (*See In re Pegasus Gold Corp.*, 394 F.3d 1189 (9th Cir. 2005). Supplemental jurisdiction extends only to those claims that are "so related to the (plaintiff's) claims...that they form part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C. §1367(a) (emphasis and parentheses added). This embodies a requirement that all claims arise from a "common nucleus of operative facts." *In re Pegasus Gold Corp.*, *supra*, at 1195; *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L.Ed. 2d 218 (1966). Applying this requirement here, it is clear that the aggregate of operative facts giving rise to Dodson's counterclaim (for breach of contract regarding YKF's post-petition sale of its shares of Smart Alec's to Smart Alec's) is entirely different from the facts supporting YKF's complaint (for avoidance of the debtor's prepetition transfer of his shares of Smart Alec's to Dodson). The complaint and counterclaim bear no logical relation to each other and rest upon different documentary, testimonial and other evidence. Accordingly, the counterclaim is not within the bankruptcy court's supplemental jurisdiction.

Conclusion

Based upon the foregoing authorities and argument, YKF respectfully requests that its motion to dismiss Dodson's counterclaim be granted and for such other relief as the court deems appropriate.

Dated: November 14, 2007

NIXON PEABODY LLP

By: /s/ James S. Monroe

James S. Monroe
Attorneys for Yugen Kaisha, Y.K.F.

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6 Telephone: 415-788-1702
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8 Attorney for Defendant
9 and Counterclaimant
10 STEPHANIE DODSON

CV 08

SC
0225

11 UNITED STATES BANKRUPTCY COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 In re:) Case No. 05-32929
15)
16 ALEXANDER N. POPOV,) Chapter 7
17)
18 Debtor.)
19)
20) A.P. No. 07-03104
21 YUGEN KAISAH, Y.K.F.)
22)
23) MOTION (1) TO AMEND ANSWER AND
24) (2) TO COMPEL PLAINTIFF TO
25) FURNISH SECURITY FOR COSTS
26)
27 Defendant.)
28)
29) Date: Dec. 21, 2007
30) Time: 9:30 a.m.
31) Court: Judge Carlson
32)
33 STEPHANIE DODSON,)
34 Counterclaimant,)
35)
36 vs.)
37)
38 YUGEN KAISAH, Y.K.F.)
39)
40)
41 Claimant.)
42)

43 COMES NOW defendant, STEPHANIE DODSON ("Defendant"), and
44 upon motion (1) to amend her Answer to add the affirmative
45 defenses of lack of capacity and collateral estoppel, and (2) to

1 April 20, 2006. Therefore the date of the contract in question,
2 for the transfer to Defendant of Debtor's residual interest of
3 the Debtor in the shares of stock of Smart Alec's Intelligent
4 Foods, Inc. ("Smart Alec's"), is an essential part of Plaintiff's
5 Section 548 claim and Defendant's defenses thereto.

6 **B. Lack of Capacity.**

7
8 4. As to capacity, Defendant seeks to assert the incapacity
9 of Plaintiff to bring this proceeding because it is not qualified
10 to do business in California, and, potentially, it may not have
11 capacity to sue under Japanese law. As set forth in the
12 Declaration of Joel K. Belway ("Belway Declaration"), the
13 California Secretary of State's online record of corporations
14 does not show Plaintiff's name.

15 5. Plaintiff has sued under Section 548, but also asserts
16 state law claims for fraudulent conveyance. Even if the Section
17 548 claim could stand by itself, and even if Plaintiff's lack of
18 qualification to do business in California did not affect
19 Plaintiff's capacity to sue thereunder, Plaintiff would have to
20 demonstrate capacity to bring its state law claims. Under
21 California law, a foreign corporation not qualified to do
22 business in California may not sue in California courts,
23 Corporations Code Section 2203(c). Defendant submits that rule
24 would also preclude Plaintiff's suing in this Court on state law
25 claims.
26

27 6. Defendant seeks leave to amend her Answer to add the
28 lack of capacity and collateral estoppel defenses under Rule

1 15(a), FRCP, which is incorporated into Bankruptcy Rule 7015.
2 Rule 15 states that leave to amend a pleading "shall be freely
3 given when justice requires." In this case, no prejudice would
4 result from allowing Defendant to amend to add the two additional
5 defendants. There has been one status conference, and the case is
6 not at issue, with Plaintiff having moved to dismiss the
7 Counterclaim. Moreover, Martin Triano ("Triano"), the plaintiff
8 in the Triano Adversary Proceeding, has moved to intervene in
9 this proceeding, and the Court has not yet heard that motion.
10

11 **SECURITY FOR COSTS**

12 7. Defendant also seeks an order that Plaintiff, which
13 alleges that it is a Japanese corporation, furnish security for
14 costs. Specifically, Plaintiff should be required to furnish
15 \$25,000 in security, or such other sum as the Court deems
16 reasonable.

17 8. This Court has the power to require Plaintiff to post
18 security under the federal courts' power to tax costs. *Anderson*
19 *v. Steers, Sullivan, McNamar & Rogers*, 998 F.2d 495, 496 (7th Cir.
20 1993). Federal courts follow the forum state's practice with
21 regard to security for costs. *Simulnet East Assocs. v. Ramada*
22 *Hotel Operating Co.*, 37 F.3d 573, 574 (9th Cir. 1994).
23

24 9. California law provides in CCP Section 1030 that a
25 defendant may file a motion for an order requiring a nonresident
26 or foreign corporation plaintiff to furnish an undertaking for
27 costs and attorney's fees.
28

DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. On November 27, 2007, I served the attached **sMotion (1) to Amend Answer and (2) to Compel Plaintiff to Furnish Security for Costs** on the interested parties in this action by placing true copies thereof in sealed envelopes and transmitting said envelopes to the following addresses by the means indicated:

Via First-Class U.S. Mail

James S. Monroe, Esq.
Gregory E. Schopf, Esq.
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996

U.S. Trustee
235 Pine Street, Suite 850
San Francisco, CA 94104

Mark D. Byrne, Esq.
Triano & Byrne
25 Jessie Street
16th Floor
San Francisco, CA 94105-2749

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 27, 2007, at San Francisco, California.

\s\ Joel K. Belway

1 JOEL K. BELWAY [60556]
2 THE LAW OFFICE OF JOEL K. BELWAY
3 Professional Corporation
235 Montgomery Street, Suite 668
San Francisco, California 94104
Telephone: 415-788-1702
4 Facsimile: 415-788-1517

SC

5 Attorney for Defendant
6 and Counterclaimant
STEPHANIE DODSON

CV 08 0225

7
8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 In re:) Case No. 05-32929
13)
14 ALEXANDER N. POPOV,) Chapter 7
15 Debtor.)
16)
17) A.P. No. 07-03104
18 YUGEN KAISAH, Y.K.F.)
19) DECLARATION OF JOEL K. BELWAY RE
20) MOTION (1) TO AMEND ANSWER AND
21 STEPHANIE DODSON,) (2) TO COMPEL PLAINTIFF TO
22 Defendant.) FURNISH SECURITY FOR COSTS
23)
24) Date: Dec. 21, 2007
25) Time: 9:30 a.m.
26 STEPHANIE DODSON,) Court: Judge Carlson
27 Counterclaimant,)
28 vs.)
29)
30 YUGEN KAISAH, Y.K.F.)
31)
32 Claimant.)
33)

34 I, Joel K. Belway, declare and state as follows:

35 1. I have personal knowledge of the facts set forth in this
36 Declaration and if required I could and would testify competently
37
38

DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. On November 27, 2007, I served the attached Declaration of Joel K. Belway re Motion (1) to Amend Answer and (2) to Compel Plaintiff to Furnish Security for Costs on the interested parties in this action by placing true copies thereof in sealed envelopes and transmitting said envelopes to the following addresses by the means indicated:

Via First-Class U.S. Mail

James S. Monroe, Esq.
Gregory E. Schopf, Esq.
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996

U.S. Trustee
235 Pine Street, Suite 850
San Francisco, CA 94104

Mark D. Byrne, Esq.
Triano & Byrne
25 Jessie Street
16th Floor
San Francisco, CA 94105-2749

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 27, 2007, at San Francisco, California.

\s\ Joel K. Belway

James S. Monroe, Esq. (State Bar Number: 102328)
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Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

CV 08

**SC
0225**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER N. POPOV,

Debtor.

Case No. 05-32929

Chapter 7

YUGEN KAISHA, Y.K.F.,

Plaintiff,

v.

STEPHANIE DODSON,

Defendant.

Adv. Pro. No.: 07-03104

**OPPOSITION OF YUGEN KAISHA, Y.K.F.
TO MOTION FOR INTERVENTION BY
MARTIN F. TRIANO**

Hearing

Date: December 14, 2007
Time: 9:30 a.m.
Place: Courtroom 23
Judge: Hon. Thomas E. Carlson

INTRODUCTION AND STATEMENT OF FACTS

Yugen Kaisha, Y.K.F. ("YKF"), plaintiff in the above-captioned action, hereby submits this opposition to the motion of Martin F. Triano dba Law Offices of Martin F. Triano ("Triano") to file a complaint in intervention in this action pursuant to Rule 7024 of the Federal Rules of Bankruptcy Procedure and Rule 24 of the Federal Rules of Civil Procedure on the grounds that: (1) the bankruptcy court does not have subject matter jurisdiction with respect to Triano's proposed

15

1 complaint since there is no independent jurisdictional basis for the complaint under §§28 U.S.C.
2 §1334(b) 157(b) and it falls outside the court's supplemental jurisdiction under 28 U.S.C. §1367(a);
3 and, alternatively, (2) even if the court were to have subject matter jurisdiction of Triano's proposed
4 complaint, the requirements for intervention are not met and, accordingly, the motion should be
5 denied.

6 YKF's complaint herein seeks to avoid and recover the debtor's prepetition transfer of
7 3,774,000 shares of common stock (the "Smart Alec's Shares") of Smart Alec's Intelligent Food,
8 Inc., a California corporation ("Smart Alec's") to Dodson as a fraudulent conveyance. YKF has the
9 right to pursue this avoidance action pursuant to an assignment agreement entered into with the
10 Chapter 7 Trustee of the debtor's bankruptcy estate which was authorized and approved by order
11 entered herein on July 31, 2007. YKF maintains that the Smart Alec's Shares were transferred to
12 Dodson shortly before the September 6, 2005 petition date with the actual intent to hinder, delay or
13 defraud the debtor's creditors by removing said shares from the bankruptcy estate and thereby
14 retaining control of Smart Alec's to the exclusion of the debtor's creditors.

15 Triano's proposed complaint in intervention alleges a state law based contract claim related to
16 a prepetition agreement allegedly entered into with the debtor regarding Triano's provision of various
17 legal services to the debtor. As part of the contract, Triano contends that the debtor granted him a
18 security interest for payment of sums due Triano under the fee agreement against certain assets,
19 including the Smart Alec's Shares. Pursuant to his proposed complaint in intervention for declaratory
20 relief against YKF and Dodson (which is in addition to his complaint against Dodson and Smart
21 Alec's concerning this dispute which is presently pending in Alameda County Superior Court),
22 Triano is essentially seeking to liquidate his attorney's fees claim for services allegedly provided to
23 the debtor and establish the validity of his alleged security interest in the Smart Alec's Shares as
24 collateral for the payment thereof. Since the debtor has received a discharge of any personal
25 obligation to pay any amounts owing to Triano under the alleged fee agreement, the relief sought
26 concerns the alleged collateral, not the debtor.

ARGUMENT

A. The Court Does Not Have Subject Matter Jurisdiction With Respect to Triano's Proposed Complaint in Intervention.

Rule 24 of the Federal Rules of Civil Procedure does not alter or displace subject matter jurisdiction requirements. A bankruptcy court has subject matter jurisdiction to adjudicate a complaint in intervention only if there is an independent jurisdictional basis for the counterclaim as provided by 28 U.S.C. §§1334(b) and 157(b) or it falls within the court's supplemental jurisdiction under 28 U.S.C. §1367(a).

Pursuant to 28 U.S.C. §§1334(b) and 157(b), the bankruptcy court has jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." Unlike YKF's complaint which asserts avoidance claims arising under the Bankruptcy Code (11 U.S.C. §§548, 550 & 544(b)), Triano's complaint does not fall within any of these categories since it is based solely upon state law, exists apart from the bankruptcy case, and does not involve or have any conceivable potential impact on the bankruptcy estate. By his complaint, Triano seeks to liquidate his discharged claim for prepetition attorney's fees allegedly owing by the debtor, establish a junior security interest for this claim in the Smart Alec's Shares, and obtain certain relief against Dodson and YKF only. Accordingly, his complaint is not within the statutory grant of bankruptcy jurisdiction.

Since the court does not have an independent basis for federal bankruptcy court jurisdiction with respect to Triano's complaint, permissive intervention under Rule 24(b) is precluded without further analysis. Recent Ninth Circuit cases have reaffirmed that an applicant for permissive intervention must establish an independent basis for jurisdiction. *Northwest Forest Products Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996); *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993), *aff'd*, 64 F.3d 1266 (9th Cir. 1995).

Likewise, Triano's proposed complaint in intervention is not within the bankruptcy court's supplemental jurisdiction under 28 U.S.C. §1367(a) (*See In re Pegasus Gold Corp.*, 394 F.3d 1189 (9th Cir. 2005), which precludes intervention as of right under Rule 24(a)(2). Supplemental jurisdiction extends only to those claims that are "so related to the (plaintiff's) claims...that they form

part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C. §1367(a) (emphasis and parentheses added). This embodies a requirement that all claims arise from a “common nucleus of operative facts.” *In re Pegasus Gold Corp.*, *supra*, at 1195; *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L.Ed. 2d 218 (1966). Applying this requirement here, it is clear that the aggregate of operative facts giving rise to Triano’s complaint (which seeks to liquidate and enforce certain contract rights under a prepetition contract for attorney’s fees) is entirely different from the facts supporting YKF’s complaint (for avoidance of the debtor’s prepetition transfer of his shares of Smart Alec’s to Dodson). YKF’s complaint and Triano’s complaint bear no logical relation to each other and rest upon different documentary, testimonial and other evidence. Under these circumstances, Triano’s complaint is not within the bankruptcy court’s supplemental jurisdiction.

B. Even If The Court Were to Have Subject Matter Jurisdiction of The Proposed Complaint In Intervention, The Requirements For Intervention Under Rule 24 Are Not Met In This Case.

(1) Triano is Not Entitled to Intervene As of Right Pursuant to Rule 24(a)(2)

Intervention of right under Rule 24(a)(2) involves a four-part test, each of which must be satisfied. (See, *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). Triano’s proposed Complaint in Intervention fails to satisfy two of these requirements – that he have a significantly protectable interest in the lawsuit to merit intervention and that the resolution of YKF’s claims will actually affect Triano. *Id.*

As discussed above, YKF’s complaint seeks to avoid and recover the Smart Alec’s shares transferred by the debtor to Dodson as a fraudulent conveyance. By this action, YKF does not seek any relief regarding Triano’s claimed security interest in the shares and any such interest will be unaffected by the fraudulent conveyance action; meaning that whatever enforceable security rights that Triano has with respect to the Smart Alec’s Shares will continue regardless of whether the transfer to Dodson is avoided as a fraudulent conveyance.

Triano posits that he may be inconvenienced if YKF prevails on its complaint and Triano it subsequently becomes necessary for Triano to enforce it alleged security interest directly against

1 YKF. However, this result is highly speculative and does not support intervention. The mere fact that
2 intervention may be convenient for Triano does not establish a right to intervene in YKF's lawsuit.

3 Triano also argues that he may have an interest in any funds that YKF may receive in
4 settlement of the fraudulent conveyance action as proceeds of his alleged collateral. This is clearly
5 incorrect as any such settlement would be attributable to the avoidance action, not to a sale or
6 exchange of the Smart Alec's shares.

7 Since Triano has not and cannot establish any real impairment of a significant right that he
8 will suffer as a result of the fraudulent conveyance action, intervention as of right under Rule 24(a)(2)
9 is unavailable to him.

10 **(2) Permissive Intervention By Triano Under Rule 24(b)(2) Inappropriate**

11 Under Rule 24(b)(2), permissive intervention may be appropriate where the original
12 complaint and the complaint in intervention share common questions of fact and law and where
13 permitting such intervention would not unduly delay or prejudice the original parties. The purpose of
14 the rule is to prevent a multiplicity of suits where common questions of law or fact are involved.
15 *Washington Electric Cooperative, Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 922
16 F.2d 92, 97 (2nd Cir. 1990).

17 Here, as discussed above, there are no significant common questions of law or fact shared by
18 YKF's complaint and Triano's proposed complaint in intervention. In fact, the operative facts giving
19 rise to the respective complaints are entirely different. Under these circumstances alone, the court
20 should deny permissive intervention.

21 However, the Court should also deny intervention by Triano due to the numerous collateral
22 and complex issues that Triano proposes to inject into this litigation which will make the litigation
23 much more expensive and protracted for YKF. The nature of the action would be transformed from a
24 relatively straightforward avoidance action, to one involving what appears to be highly complex and
25 contentious contract and related disputes regarding the nature and amount of attorney's fees that
26 Triano may be entitled to recover. Intervention cannot be used to so radically alter the scope of
27 YKF's suit, causing it delay and prejudice. *Id.*

CONCLUSION

Based upon the foregoing authorities and argument, YKF respectfully requests that Triano's motion for intervention be denied and for such other relief as the court deems appropriate.

Dated: November 30, 2007

NIXON PEABODY LLP

By: /s/ James S. Monroe

James S. Monroe
Attorneys for Yugen Kaisha, Y.K.F.

CERTIFICATE OF SERVICE

CASE NAME: IN RE ALEXANDER N., POPOV, Debtor;
ADV. PROCEEDING: YUGEN KAISHA, Y.K.F. v. STEPHANIE DODSON
COURT: U.S. Bankruptcy Court, Northern District of California
 (San Francisco)
CASE NO.: 05-32929-TC; Adv. Pro. No.: 07-03104-TC
FILE: 031405.000006

I, the undersigned, certify that I am employed in the City and County of San Francisco, California; that I am over the age of eighteen years and not a party to the within action; and that my business address is One Embarcadero Center, Suite 1800, San Francisco, CA 94111-3996. On this date, I served the following document(s):

**OPPOSITION OF YUGEN KAISHA, Y.K.F. TO MOTION FOR INTERVENTION BY
 MARTIN F. TRIANO**

on the party stated below, placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

X : By First-Class Mail — I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

_____: By Certified Mail Service — I am readily familiar with the firm's practice for collection and processing of correspondence for Certified Mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with Certified Mail postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

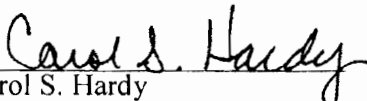
Addressee

Joel K. Belway
 THE LAW OFFICE OF JOEL K. BELWAY
 Professional Corporation
 235 Montgomery Street, Suite 668
 San Francisco, California 94104

United States Trustee
 San Francisco Division
 235 Pine Street, Suite 700
 San Francisco, CA 94104

Mark D. Byrne
 Law Offices of Triano and Byrne
 25 Jessie Street, 16th Floor
 San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 30, 2007, at San Francisco, California.


 Carol S. Hardy

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5 Attorney for Defendant
6 and Counterclaimant
STEPHANIE DODSON

CV 08

**SC
0225**

7
8 **UNITED STATES BANKRUPTCY COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**
11

12 In re:) Case No. 05-32929
13)
14 ALEXANDER N. POPOV,) Chapter 7
15)
Debtor.)
16)
YUGEN KAISHA, Y.K.F., Plaintiff) A.P. No. 07-03104
17) **MEMORANDUM IN OPPOSITION TO**
v.) **MOTION TO DISMISS COUNTERCLAIM**
18 STEPHANIE DODSON,)
19)
Defendant.)
20)
STEPHANIE DODSON,) Date: Dec. 21, 2007
21 Counterclaimant,) Time: 9:30 a.m.
22 vs.) Court: Judge Carlson
23 YUGEN KAISHA, Y.K.F.)
24 Counterdefendant.)
25)

26 Defendant and counterclaimant, STEPHANIE DODSON ("Dodson"),
27 submits this Memorandum in opposition to the motion of
28 counterdefendant, YUGEN KAISHA, Y.K.F. ("YKF"), to dismiss

1 Dodson's counterclaim (the "Counterclaim") against YKF (the "YKF
2 Motion").

3 **I. Introduction.**

4 YKF has sued Dodson in its complaint herein (the
5 "Complaint") for an alleged fraudulent transfer to Dodson by
6 debtor, Alexander Popov ("Debtor"), of Debtor's interest in
7 certain shares of corporate stock of Smart Alec's Intelligent
8 Foods, Inc., a California corporation ("Smart Alec's"). As she
9 testified at the trial in this Court in an objection to discharge
10 proceeding, *Triano v. Popov*, A.P. No. 05-3485 (the "Triano AP"),
11 Dodson purchased, under a share purchase agreement dated April
12 18, 2004 (the "Share Purchase Agreement"), for a price of
13 \$12,500, Debtor's residual interest in 3,744,000 Smart Alec's
14 shares (the "Shares"), which were, as of April 2004, pledged to
15 YKF as security for hundreds of thousands of dollars of
16 indebtedness.
17

18 The Share Purchase Agreement is attached as Exhibit 3 to the
19 Complaint. Exhibit 1 to the YKF Motion is a copy of the
20 confidential settlement agreement and release among YKF, Smart
21 Alec's, Debtor and Dodson dated February 6, 2004 (the "Settlement
22 Agreement"); at page 2, paragraph 2.b, of that agreement; Debtor
23 agreed to pledge the Shares to YKF. Thus, at the time of the
24 transfer that is the subject of its Complaint, which YKF alleges
25 was intended to hinder, delay or defraud creditors, YKF had
26 physical possession of the Shares.
27
28

1 Martin F. Triano ("Triano"), the plaintiff in the Triano AP,
2 has now sued Dodson (and Smart Alec's) in the Alameda County
3 Superior Court, in *Triano v. Dodson, et al.*, No. RG-07-322877
4 (the "Alameda SCT Action"), alleging that he, Triano, has a first
5 lien on the Shares. Triano has also filed a motion to intervene
6 in this proceeding (the "Intervention Motion"), contending that
7 because ownership of the Shares is being litigated herein, he has
8 an interest, as a lien claimant, in protecting himself.
9

10 While Dodson disputes all claims against her (and against
11 Smart Alec's and the Chapter 7 estate) by Triano, she agrees that
12 intervention herein by Triano is appropriate and necessary, so
13 that her interests, too, can be determined in a single forum at a
14 single time. As she testified at the Triano AP trial, Dodson
15 caused the Shares to be redeemed from the pledge to YKF, which
16 also had a UCC-1 lien on the assets of Smart Alec's, borrowing
17 thousands of dollars from Summit Bank to redeem the Shares and to
18 acquire YKF's own shares in Smart Alec's. Whoever has a claim to
19 the Shares or a lien thereon should once and for all be decided.
20

21 **II. Argument.**

22 **A. The Complaint.**

23 The Complaint alleges that the transfer to Dodson by Debtor
24 under the Share Purchase Agreement was intended to hinder, delay
25 or defraud creditors or, alternatively, was constructively
26 fraudulent (the "Transfer"). The Transfer was of Debtor's
27 residual interest in the Shares, and the Share Purchase Agreement
28 explicitly refers to the pledge of the Shares to YKF and recites

1 the \$775,000 of indebtedness that had to be repaid to YKF to free
2 the Shares from YKF's possessory lien.

3 **B. The Counterclaim.**

4 The Counterclaim alleges that, in delaying Dodson's final
5 payoff of the balance of indebtedness to YKF (the same \$775,000
6 indebtedness, secured by the Shares and assets of Smart Alec's,
7 that is the subject of the Settlement Agreement), YKF extracted
8 from Dodson the sum of approximately \$90,000 in increased fees
9 and charges by delaying, in bad faith, the payoff.

10 Demonstrating, through the legal and business maneuver that
11 led to this proceeding, that avarice made it into the 21st
12 Century, YKF, after its final extraction from Dodson under the
13 Settlement Agreement, came to the Trustee herein and acquired,
14 for \$30,000, the estate's avoidance rights. YKF then sued Dodson,
15 saying, in effect, that, after receiving \$775,000 plus interest
16 and attorney's fees plus the approximately \$90,000 that is the
17 subject of the Counterclaim, "We want more."

18 **C. The nexus between the Complaint and Counterclaim.**

19 Ownership and transfer of the corporate shares of Smart
20 Alec's provide the factual and legal nexus among the Claim, the
21 Counterclaim and the Intervention Motion. The Transfer,
22 challenged by YKF in the Complaint, followed the pledge of the
23 shares to YKF by Debtor, and preceded the redemption of the
24 Shares and YKF's owns shares in Smart Alec's, in the course of
25 which YKF's bad faith foot-dragging took place, giving rise to
26
27
28

1 the Counterclaim. By denying the YKF Motion and granting the
2 Intervention Motion, at the end of the day, the judge and jury in
3 this proceeding will be presented and can decide all issues
4 regarding the Transfer, ownership of the Shares, what was the
5 correct amount that should have been paid to redeem the Shares
6 and YKF's shares in Smart Alec's, whether Triano has a lien on
7 the Shares, and whether Triano has allowable claims for
8 attorney's fees, secured or otherwise.
9

10 **C. This Court has jurisdiction over the Counterclaim.**

11 While Dodson would concede for purposes of the YKF Motion,
12 that she could not have, as a plaintiff jurisdictionally opened
13 the door to this Court, walked in and sued YKF for the \$90,000
14 that is the subject of the Counterclaim, the fact is that she did
15 not open that door. YKF opened the door when it sued Dodson.

16 In addressing the Complaint and her response thereto, Dodson
17 first had to consider the compulsory counterclaim rule under FRCP
18 13, incorporated by Bankruptcy Rule 7013. (Because Dodson has not
19 been sued by a bankruptcy trustee or debtor in possession, the
20 relief from compulsory counterclaims of Rule 7013 does not
21 apply.) Rule 13(a)(1), FRCP, requires a defendant to bring a
22 counterclaim against the plaintiff if the counterclaim arises out
23 of the same transaction or occurrence of the complaint. Here, the
24 transaction or occurrence of the Counterclaim is part of the same
25 factual chain starting with the Settlement Agreement and the
26 pledge of the Shares, leading to the Transfer, to the redemption
27
28

1 from YKF and to Dodson's forced overpayment to YKF. Thus, Dodson
2 could only withhold filing the Counterclaim at her peril.

3 Second, YKF, having started this litigation, which does not
4 impact the bankruptcy estate regardless of its outcome, should
5 not be heard to protest exercise of the supplemental jurisdiction
6 of this Court under 28 U.S.C. §1367(a). Such jurisdiction,
7 formerly known as pendent jurisdiction, allows this Court to
8 adjudicate a state law claim, as that raised by Dodson's
9 Counterclaim, if it is sufficiently related to a federal claim
10 properly before it.
11

12 The history of Smart Alec's shares of corporate stock
13 contains the names of the Debtor, YKF, Dodson and Triano. While
14 the Debtor has received a discharge, over Triano's unsuccessful
15 objection, his name is still being taken in vain by YKF and
16 Triano. What Dodson paid to Debtor on the front-end of this
17 history and whether that was too little, and what Dodson paid to
18 YKF on the back-end and whether that was too much, and whether
19 Triano's lien claim affects either YKF or Dodson or neither, are
20 the parts of the history Smart Alec's shares that should be
21 decided by this Court. Keeping all parts of the dispute and all
22 three of the disputants together lies within this Court's
23 discretionary exercise of supplemental jurisdiction.
24

25 YKF cites a Ninth Circuit case, *In re Pegasus Gold Corp.*,
26 394 F.3d 1189, 1195 (9th Cir. 2005), for the unremarkable
27 proposition that supplemental jurisdiction extends to claims that
28

1 are part of the same "common nucleus of operative facts." Dodson
2 and YKF agree on the law, but disagree on its application to the
3 facts. Dodson submits that the part of the history of the Smart
4 Alec's shares presented by the Counterclaims fits into, if on one
5 side, of the common nucleus of facts presented by the Complaint,
6 Counterclaim and Intervention Motion. And even if the Court were
7 to deny the latter, it would have, and should exercise,
8 supplemental jurisdiction over the Counterclaim.
9

10 **III. Conclusion.**

11 Based upon the foregoing, the Court should deny the YKF
12 Motion.
13

14 Respectfully submitted,

15 Dated: December 7, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

17 /s/ Joel K. Belway

JOEL K. BELWAY

18 Attorney for Stephanie Dodson
19
20
21
22
23
24
25
26
27
28

DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. On December 7, 2007, I served the attached **Memorandum in Opposition to Motion to Dismiss Counterclaim** on the interested parties in this action by placing true copies thereof in sealed envelopes and transmitting said envelopes to the following addresses by the means indicated:

Via First-Class U.S. Mail

James S. Monroe, Esq.
Gregory E. Schopf, Esq.
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996

U.S. Trustee
235 Pine Street, Suite 850
San Francisco, CA 94104

Mark D. Byrne, Esq.
Triano & Byrne
25 Jessie Street
16th Floor
San Francisco, CA 94105-2749

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 7, 2007, at San Francisco, California.

\s\ Joel K. Belway

1 James S. Monroe, Esq. (State Bar Number: 102328)
2 Gregory E. Schopf (State Bar Number: 122862)
3 NIXON PEABODY LLP
4 One Embarcadero Center, Suite 1800
5 San Francisco, CA 94111-3996
6 Telephone: (415) 984-8200
7 Facsimile: (415) 984-8300
8 E-mail: jmonroe@nixonpeabody.com

9 Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

CV 08

0225

10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 In re:

14 ALEXANDER N. POPOV,

15 Debtor.

Case No. 05-32929

Chapter 7

16 YUGEN KAISHA, Y.K.F.,

17 Plaintiff,

18 v.

19 STEPHANIE DODSON,

20 Defendant.

Adv. Pro. No.: 07-03104

**YUGEN KAISHA, Y.K.F.'S OPPOSITION
TO DEFENDANT'S MOTION TO COMPEL
PLAINTIFF TO FURNISH SECURITY FOR
COSTS, AND RESPONSE TO MOTION TO
AMEND ANSWER**

Hearing

21 Date: December 21, 2007
22 Time: 9:30 a.m.
23 Place: Courtroom 23
24 Judge: Hon. Thomas E. Carlson

25 Yugen Kaisha, Y.K.F. ("YKF"), plaintiff in the above-captioned action, hereby submits this
26 (i) opposition to the motion of Stephanie Dodson ("Dodson") to compel YKF to furnish security for
27 costs on the grounds that the requirements for imposition of a bond under California Code of Civil
28 procedure §1030 are not established, and (ii) response to Dodson's motion to amend her answer to
the complaint.

OPPOSITION TO MOTION TO COMPEL PLAINTIFF TO
FURNISH SECURITY FOR COSTS; ADV. CASE NO. 07-03104

10836225.1

1 **RESPONSE TO MOTION TO AMEND ANSWER**

2 Dodson requests leave of court to amend her answer to the complaint to allege two new
3 affirmative defenses – collateral estoppel and lack of capacity. As discussed below, neither of these
4 proposed defenses has any conceivable applicability to this case.

5 **Collateral Estoppel.** YKF alleges in its complaint against Dodson that Alexander Popov
6 (“Popov”) transferred his shares of stock in Smart Alec’s Intelligent Food, Inc. (“Smart Alec’s”) to
7 Dodson shortly before the September 6, 2005 filing date of Popov’s bankruptcy petition with the
8 actual intent to hinder, delay or defraud his creditors. Dodson seeks to allege as an affirmative
9 defense that YKF is precluded from establishing that the shares were transferred shortly before
10 Popov’s bankruptcy based upon an alleged determination by this court that the share transfer
11 occurred on April 18, 2004 (the stated date of the share transfer agreement) in connection with the
12 trial of Martin F. Triano’s (“Triano”) complaint objecting to Popov’s discharge based upon
13 fraudulent concealment of assets. Collateral estoppel is clearly inapplicable to YKF on these facts
14 since neither YKF nor the Chapter 7 Trustee was a party or in privity with a party to the Triano
15 action. Moreover, the share transfer date was not even litigated in the Triano action and was instead
16 stipulated to by Triano and Popov. Collateral estoppel is inapplicable in any event to issues that were
17 not actually and necessarily litigated in the prior action.

18 **Lack of Capacity.** Dodson also seeks to add as an affirmative defense that YKF lacks the
19 capacity to sue herein based on California Corporations Code §2203(c) which precludes a foreign
20 corporation from maintaining an action in California state court in connection with intrastate business
21 unless it qualifies to do business in California. However, even if §2203(c) were applicable to this
22 action in principle, it clearly has no applicability to the transaction in this case since the mere
23 purchase of an avoidance action from the bankruptcy trustee by YKF, a foreign corporation with no
24 California presence, does not amount to the conduct of intrastate business within the meaning of
25 §2203. A foreign corporation’s mere purchase of an asset from a resident of California is business
26 done in interstate commerce, not intrastate commerce. *Charlton Silk Company v. Jones* (1923) 190
27 Cal. 341.

1 Notwithstanding the foregoing, YKF does not oppose Dodson's motion to amend her answer.
2 However, YKF does request that the court require Dodson to file an amended pleading which is
3 complete in itself as required by Bankruptcy Local Rule 1001-2(a)(26) and District Court Local Rule
4 10-1.

5 **OPPOSITION TO MOTION TO REQUIRE SECURITY FOR COSTS**

6 Dodson's motion for an order requiring YKF to furnish a \$25,000 undertaking for costs
7 should be denied. Even assuming, *arguendo*, that California Code of Civil Procedure §1030 is
8 applicable as Dodson contends, the requirements for imposition of a bond under this statute are not
9 established.

10 It is undisputed that YKF is a foreign corporation with no U.S. presence. Thus, the first
11 requirement of §1030(b) is satisfied.

12 The second element of §1030(b) requires Dodson to present evidence to establish a
13 "reasonable possibility" that she will obtain judgment on YKF's complaint. Here, Dodson's burden
14 to prove a reasonable possibility that she will obtain judgment has not been satisfied and, in fact,
15 Dodson has offered absolutely no evidence whatsoever to refute YKF's claims. Accordingly and on
16 this basis alone, the motion should be denied. *A. Farber & Ptnrs., Inc. v. Garber*, 417 F.Supp.2d
17 1143 (C.D. Cal., 2006).

18 Section 1030(b) also requires that the defendant submit an affidavit which sets forth the
19 nature and amount of the costs defendant has incurred and expects to incur. Here, the declaration of
20 Dodson's counsel merely states in very general terms that defendant may incur costs for expert
21 witnesses, possible travel expenses for depositions in Japan and North Carolina, and court reporter
22 fees, and then provides a guess that these expenses could be as much as \$25,000. This is an
23 insufficient showing of the nature and amount of costs actually expected to be incurred as required by
24 §1030(b). Moreover, Dodson's counsel provides no explanation regarding how the taking of
25 depositions of unspecified persons in North Carolina and/or Japan would have any conceivable
26 relevance to YKF's fraudulent transfer complaint.

1 Based upon the foregoing, YKF respectfully requests that Dodson's motion to compel YKF to
2 furnish security for costs be denied and for such other relief as the court deems appropriate.

3 Respectfully submitted,

4
5 Dated: December 11, 2007

NIXON PEABODY LLP

6
7 By: /s/ James S. Monroe

8 James S. Monroe
9 Attorneys for Yugen Kaisha, Y.K.F.

CERTIFICATE OF SERVICE

CASE NAME: IN RE ALEXANDER N., POPOV, Debtor;
ADV. PROCEEDING: YUGEN KAISHA, Y.K.F. v. STEPHANIE DODSON
COURT: U.S. Bankruptcy Court, Northern District of California
 (San Francisco)
CASE NO.: 05-32929-TC; Adv. Pro. No.: 07-03104-TC
FILE: 031405.000006

I, the undersigned, certify that I am employed in the City and County of San Francisco, California; that I am over the age of eighteen years and not a party to the within action; and that my business address is One Embarcadero Center, Suite 1800, San Francisco, CA 94111-3996. On this date, I served the following document(s):

YUGEN KAISHA, Y.K.F.'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO FURNISH SECURITY FOR COSTS, AND RESPONSE TO MOTION TO AMEND ANSWER

on the party stated below, placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

X : By First-Class Mail — I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

 : By Certified Mail Service — I am readily familiar with the firm's practice for collection and processing of correspondence for Certified Mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with Certified Mail postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

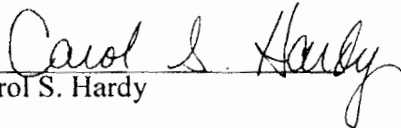
Addressee

Joel K. Belway
 THE LAW OFFICE OF JOEL K. BELWAY
 Professional Corporation
 235 Montgomery Street, Suite 668
 San Francisco, California 94104

United States Trustee
 San Francisco Division
 235 Pine Street, Suite 700
 San Francisco, CA 94104

Mark D. Byrne
 Law Offices of Triano and Byrne
 25 Jessie Street, 16th Floor
 San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 11, 2007, at San Francisco, California.


 Carol S. Hardy

SC

1 James S. Monroe, Esq. (State Bar Number: 102328)
2 Gregory E. Schopf (State Bar Number: 122862)
3 NIXON PEABODY LLP
4 One Embarcadero Center, Suite 1800
5 San Francisco, CA 94111-3996
6 Telephone: (415) 984-8200
7 Facsimile: (415) 984-8300
8 E-mail: jmonroe@nixonpeabody.com

CV 08

0225

9 Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 In re:

14 ALEXANDER N. POPOV,

15 Debtor.

Case No. 05-32929

Chapter 7

16 YUGEN KAISHA, Y.K.F.,

17 Plaintiff,

18 v.

19 STEPHANIE DODSON,

20 Defendant.

Adv. Pro. No.: 07-03104

21 **REPLY TO DEFENDANT'S OPPOSITION
22 TO PLAINTIFF'S MOTION TO DISMISS
23 COUNTERCLAIM FOR LACK OF
24 SUBJECT MATTER JURISDICTION**

Hearing

25 Date: December 18, 2007
26 Time: 9:30 a.m.
27 Place: Courtroom 23
28 Judge: Hon. Thomas E. Carlson

29 Yugen Kaisha, Y.K.F. ("YKF"), hereby submits this reply to defendant Stephanie Dodson's
30 ("Dodson") opposition to YKF's motion to dismiss her counterclaim filed herein for lack of subject
31 matter jurisdiction on the grounds that there is no independent jurisdictional basis for the
32 counterclaim under 28 U.S.C. §1334(b) and it falls outside the court's supplemental jurisdiction
33 under 28 U.S.C. §1367(a).

20

1 In her opposition, Dodson tries mightily to obscure the issues in a vain effort to argue that the
2 complaint and counterclaim involve a common core of operative facts. However, a simple review of
3 the respective claims establishes that they involve neither the same facts nor the same applicable law.

4 YKF's complaint seeks to avoid and recover the debtor's prepetition transfer of 3,774,000
5 shares of common stock (the "Debtor's Shares") of Smart Alec's Intelligent Food, Inc., a California
6 corporation ("Smart Alec's") to Dodson as a fraudulent conveyance. YKF maintains that the
7 Debtor's Shares were transferred to Dodson shortly before the September 6, 2005 petition date with
8 the actual intent to hinder, delay or defraud the debtor's creditors by removing said shares from the
9 bankruptcy estate and thereby retaining control of Smart Alec's to the exclusion of the debtor's
10 creditors.

11 Dodson's counterclaim alleges a state law based contract claim regarding a Stock Redemption
12 Agreement, dated February 6, 2004, between Smart Alec's and YKF, whereby Smart Alec's agreed
13 to repurchase YKF's 1,440,000 shares of common stock of Smart Alec's (the "YKF Shares") for
14 \$775,000 as provided therein. On March 12, 2007, the balance due under the Stock Redemption
15 Agreement was paid to YKF and the YKF Shares were transferred to Smart Alec's. By her
16 counterclaim herein, Dodson alleges that YKF in some unexplained way delayed the payoff of the
17 amount due from Smart Alec's under the Stock Redemption Agreement, causing additional amounts
18 to have to be paid at the closing, and based thereon, seeks money damages from YKF.

19 Even if the counterclaim were properly maintainable by Dodson (which it is not since Dodson
20 is not even a party to the Stock Redemption Agreement upon which the counterclaim is based), the
21 counterclaim is clearly outside the bankruptcy court's supplemental jurisdiction under 28 U.S.C.
22 §1367(a) since the respective claims asserted in the complaint and counterclaim do not arise from a
23 "common nucleus of operative facts." *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1195 (9th Cir.
24 2005); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L.Ed. 2d 218 (1966).
25 The facts giving rise to Dodson's counterclaim (for breach of contract regarding YKF's post-petition
26 sale of its shares of Smart Alec's to Smart Alec's) are entirely different from the facts supporting
27 YKF's complaint (for avoidance of the debtor's prepetition transfer of his shares of Smart Alec's to
28

1 Dodson). The complaint and counterclaim bear no logical relation to each other and rest upon
2 different evidence and legal rights. Under these circumstances, the counterclaim is not within the
3 bankruptcy court's supplemental jurisdiction.

4 In her opposition, Dodson further attempts to obscure the issues by arguing that YKF's
5 purchase of the bankruptcy avoidance action which is the subject of the complaint is somehow
6 improper. However, Ninth Circuit decisions and case law clearly validate the bankruptcy trustee's
7 sale of avoidance actions and recognize that such a sale may often, as here, provide the greatest
8 benefit to the creditors of the bankruptcy estate. *Ducker Spradling & Metzger v. Baum Trust (In re*
9 *P.R.T.C., Inc.)*, 177 F.3d 774, 781 (9th Cir. 1999); *Briggs v. Kent (In re Prof'l Inv. Props. Of Am.)*,
10 955 F.2d 623, 625-626 (9th Cir. 1992); *Simantob v. Claims Prosecutor, L.L.C. (In re Lahijani)*, 325
11 B.R. 282, 288 (9th Cir. BAP 2005).

12 Based upon the foregoing, YKF respectfully requests that its motion to dismiss Dodson's
13 counterclaim be granted and for such other relief as the court deems appropriate.

14 Respectfully submitted,

15 Dated: December 14, 2007

NIXON PEABODY LLP

17 By: /s/ James S. Monroe

18 James S. Monroe
19 Attorneys for Yugen Kaisha, Y.K.F.

CERTIFICATE OF SERVICE

CASE NAME: IN RE ALEXANDER N., POPOV, Debtor;
ADV. PROCEEDING: YUGEN KAISHA, Y.K.F. v. STEPHANIE DODSON
COURT: U.S. Bankruptcy Court, Northern District of California
 (San Francisco)
CASE NO.: 05-32929-TC; Adv. Pro. No.: 07-03104-TC
FILE: 031405.000006

I, the undersigned, certify that I am employed in the City and County of San Francisco, California; that I am over the age of eighteen years and not a party to the within action; and that my business address is One Embarcadero Center, Suite 1800, San Francisco, CA 94111-3996. On this date, I served the following document(s):

**REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS
 COUNTERCLAIM FOR LACK OF SUBJECT MATTER JURISDICTION**

on the party stated below, placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

X : By First-Class Mail — I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

____: By Certified Mail Service — I am readily familiar with the firm's practice for collection and processing of correspondence for Certified Mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with Certified Mail postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

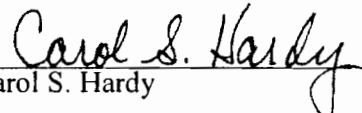
Addressee

Joel K. Belway
 THE LAW OFFICE OF JOEL K. BELWAY
 Professional Corporation
 235 Montgomery Street, Suite 668
 San Francisco, California 94104

United States Trustee
 San Francisco Division
 235 Pine Street, Suite 700
 San Francisco, CA 94104

Mark D. Byrne
 Law Offices of Triano and Byrne
 25 Jessie Street, 16th Floor
 San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 14, 2007, at San Francisco, California.


 Carol S. Hardy

1 JOEL K. BELWAY [60556]
2 THE LAW OFFICE OF JOEL K. BELWAY
3 Professional Corporation
235 Montgomery Street, Suite 668
San Francisco, California 94104
Telephone: 415-788-1702
4 Facsimile: 415-788-1517

SC

5 Attorney for Defendant
6 and Counterclaimant
STEPHANIE DODSON

CV 08

0225

7
8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 In re:

) Case No. 05-32929

13 ALEXANDER N. POPOV,
14 Debtor.

) Chapter 7
15)

) A.P. No. 07-03104

16 YUGEN KAISHA, Y.K.F., Plaintiff,

17 vs.

) REPLY TO OPPOSITION TO MOTION
18) TO AMEND ANSWER AND TO COMPEL
19) PLAINTIFF TO FURNISH SECURITY
FOR COSTS

20 STEPHANIE DODSON,
21 Defendant.

) Date: Dec. 18, 2007

) Time: 9:30 a.m.

) Court: Judge Carlson

22 STEPHANIE DODSON,
23 Counterclaimant,

24 vs.

25 YUGEN KAISHA, Y.K.F.

26 Counterdefendant.)
27)
28)

Defendant and counterclaimant, STEPHANIE DODSON ("Dodson"),
submits this reply to the opposition of plaintiff and
counterdefendant, YUGEN KAISHA, Y.K.F. ("YKF"), to Dodson's

1 motion (1) to amend her Answer to add the affirmative defenses of
2 lack of capacity and collateral estoppel, and (2) to compel YKF
3 to furnish security for costs (the "Motion").

4 **A. Motion to amend Answer.**

5 YKF's opposition first contends that, as to the defense of a
6 lack of capacity for failure to qualify to do business in
7 California, it is not doing business in California, but
8 ultimately states its non-opposition to the proposed amendment of
9 Dodson's answer (also to allege collateral estoppel), so long as
10 Dodson files an amended answer that is complete in itself. Dodson
11 will do so promptly.
12

13 Along the way to its non-opposition to the additional
14 affirmative defenses, YKF describes itself as a foreign
15 corporation with no California presence. Lest such an assertion,
16 important to the capacity issue, go unchallenged, let it be said
17 that if the following action's by YKF, disclosed upon the record
18 of this case already, do not constitute a California presence
19 (aside from anything else YKF may be doing or may have done in
20 California, subject to discovery), then perhaps YKF's position
21 will ultimately be upheld:
22

23 (1) investing \$720,000 in California in shares of Smart
24 Alec's Intelligent Foods, Inc. ("Smart Alec's"), a California
25 corporation that operates a single restaurant in on Telegraph
26 Avenue in Berkeley, California; then
27
28

1 (2) suing in the Alameda County Superior Court over that
2 investment through the same attorney's who represent it in
3 opposing the Motion; then

4 (3) settling that suit in February 2004 by a written
5 settlement agreement (Exhibit 1 to YKF's motion to dismiss the
6 counterclaim herein) (a) entered into in California, secured (b)
7 by a pledge in California of Smart Alec's shares and (c) by a
8 UCC-1 filing in Sacramento, California for Smart Alec's assets
9 and specifying California as the source of law for any disputes;
10 and then
11

12 (4) entering into a closing agreement with Dodson in March
13 2007 in California (Exhibit 2 to YKF's motion to dismiss the
14 counterclaim), specifying California law and calling for payment
15 by Dodson to YKF to the trust account of YKF's attorneys in San
16 Francisco (who represent YKF herein); then

17 (5) purchasing the avoidance rights sued upon herein from a
18 bankruptcy trustee in San Francisco, under an agreement entered
19 into in San Francisco and approved by this Court, sitting in San
20 Francisco; and then

21 (6) suing on the avoidance rights in a federal court in San
22 Francisco.
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B. Security for costs.**(1) Reasonable possibility of Dodson's prevailing.**

YKF opposes Dodson's request for security for costs on two grounds. First, it argues that Dodson has not presented evidence to establish a "reasonable possibility" that she will obtain judgment on YKF's complaint. Dodson requests that the Court, in making its assessment of whether she can show a reasonable possibility, which notably is less than either the "reasonable probability" required for injunctive relief or the "probable validity" for an attachment, take judicial notice of its own findings of fact and conclusions of law announced on the record at the end of the trial on March 27, 2007, in Triano v. Popov, A.P. No. 05-3485 (the "Findings"), which are attached hereto for the convenience of the Court.

The Findings, which are also incorporated into Dodson's Answer herein at paragraph 9 thereof, turn on the testimony of Debtor, Alexander Popov, and Dodson. That testimony, referred to in the Findings, dealt with the motives and background for the transfer of Debtor's residual interest in Smart Alec's shares that had been pledged to YKF. It is the same transfer that YKF in the complaint in this proceeding challenges as actually or constructively fraudulent. Dodson submits that the Findings reflect an existing judicial determination that she has a "reasonable possibility" of prevailing on YKF's complaint.

(2) Nature and amount of costs.

1 YKF next argues that the Motion has not sufficiently
2 demonstrated the nature and amount of costs defendant has
3 incurred and expects to incur. To date no costs have been
4 incurred, but if this matter goes forward, substantial costs may
5 be incurred.

6 First are expert witness fees, for either a court-appointed
7 expert or as part of discovery, see *Trepel v. Roadway Express,*
8 *Inc.*, 266 F.3d 418, 427 (6th Cir. 2001), for the valuation of the
9 Smart Alec's shares transferred and for the insolvency issue.
10 Such fees can, in the Court's own experience, be thousands of
11 dollars. Second, deposition transcripts and travel expenses will
12 run to thousands of more dollars if YKF refuses to make witnesses
13 available in San Francisco and Dodson is forced to fly counsel to
14 Japan or North Carolina or both. (YKF can solve that problem
15 simply: stipulate as part of a resolution of the Motion that
16 witnesses from Japan and North Carolina will be made available
17 deposition in San Francisco.)
18

19 YKF asks what conceivable relevance could the taking of
20 depositions of YKF's agents from Japan or North Carolina have to
21 a fraudulent conveyance complaint. If there were no other
22 relevance, the defense of YKF's lack of capacity, under
23 California Corporation's Code Section 2203, which is one of the
24 affirmative defenses the addition of which YKF has stated its
25 non-opposition, will require testimony and documentary evidence
26 from YKF, to show that it is and was doing business in California
27
28

and has not qualified in the State. Again, YKF can avoid the
1 travel expenses for those depositions costs by agreeing to
2 produce witnesses and documents in San Francisco, where its
3 attorneys work and where the court in which it chose to sue
4 Dodson is located.

Respectfully submitted,

Dated: December 16, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

/s/ Joel K. Belway
JOEL K. BELWAY
Attorney for Stephanie Dodson

DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. On December 16, 2007, I served the attached **Reply to Opposition to Amend Answer and to Compel Plaintiff to Furnish Security for Costs** on the interested parties in this action by placing true copies thereof in sealed envelopes and transmitting said envelopes to the following addresses by the means indicated:

Via First-Class U.S. Mail

James S. Monroe, Esq.
Gregory E. Schopf, Esq.
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U.S. Trustee
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San Francisco, CA 94104

Mark D. Byrne, Esq.
Triano & Byrne
25 Jessie Street
16th Floor
San Francisco, CA 94105-2749
(also by email to mailbox@martinftriano.com
And fax to (415)371-8001)

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 16, 2007, at San Francisco, California.

\s\ Joel K. Belway

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE THOMAS E. CARLSON, JUDGE

| | | |
|------------------|---|--------------------------------|
| In Re: |) | Case No. 05-32929-TEC-7 |
| |) | |
| ALEXANDER POPOV, |) | |
| |) | |
| Debtor. |) | |
| <hr/> | | |
| TRIANO, |) | Adv. 05-3485 |
| |) | |
| Defendant, |) | (Portion of proceedings:) |
| |) | <u>TRIAL: FINDINGS of FACT</u> |
| v. |) | <u>and CONCLUSIONS of LAW</u> |
| |) | |
| POPOV, |) | |
| |) | |
| Plaintiff. |) | Tuesday, March 27, 2007 |
| <hr/> | | San Francisco, California |

Appearances:

For the Plaintiff: Mark D. Byrne, Esq.
Law Offices of Martin F. Triano
25 Jessie Street, 16th Floor
San Francisco, California 94105
(415) 371-8000

For the Defendant: Joel K. Belway, Esq.
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(415) 788-1702

Digital Court Recorder: United States Bankruptcy Court
Clerk of the Court
Jane L. Galvani
235 Pine Street, 23rd Floor (94104)
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(415) 268-2366

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Trial: Findings of Fact and Conclusions of Law

2

1 Tuesday, March 27, 2007

3:16 o'clock p.m.

2 P R O C E E D I N G S

3 THE COURT: Okay. I'm going to make a finding on one
4 issue here. I find on the basis of the evidence presented and
5 the plaintiff's offer of proof, taking that into account as it
6 established regarding the appraised value, which I think you
7 said in your brief, was 168,000 -

8 MR. [SPEAKER]: Correct.

9 THE COURT: - of the original interest?

10 On the basis of the facts that I've heard, the
11 plaintiff having stated that there's no further evidence to be
12 offered regarding the question of concealment or retention of an
13 interest, that the debtor did not retain an interest in this
14 property after the transfer.

15 First of all, I find that the transfer was effective
16 in April of 2004, April 18th, 2004. Although the purchase price
17 needed to be paid, the defendant, if there was, you know, a
18 fraudulent conveyance for too little money, et cetera, it was -
19 the die was cast then, because all that - all Ms. Dodson had to
20 do was pay that, the remainder of that limited sum of money.
21 And she had beneficial interest at that point or at least the
22 ability to get it at that price.

23 Second, and this is the most important, I find that
24 the debtor did not act as if he owned the property in any manner
25 after that date.

Trial: Findings of Fact and Conclusions of Law

3

1 First of all, there's this - been some evidence that
2 he did - had some activities at the restaurant. I find that he
3 had no real role in the restaurant. He did not manage the
4 restaurant. He do not decide what the menu was. He didn't say
5 what the hour was. He was hired; he was fired, et cetera. He
6 had been relieved of that - all those duties. And there was a
7 replacement in that role, namely Ms. Dodson.

8 He helped on a couple occasions in very limited
9 circumstances. He did so in part because of his friendship with
10 Ms. Dodson, which was quite evidently very real throughout this
11 whole time.

12 He also, although he didn't retain an interest in
13 ownership in the property, he did have an interest in its
14 success, because the restaurant's successful operation would -
15 was a means that he could - use to retire his guaranty
16 liability, his personal liability.

17 He never got any payment of money from the restaurant
18 either as a distribution as an owner, as an employee, anything
19 else like that. He did borrow against its value. There's just
20 no evidence that he acted as if he was the owner of the
21 restaurant.

22 That the debtor and Ms. Dodson were married some two
23 and a half years later doesn't change anything. They were quite
24 clearly friends during this period, but the fact that they had
25 dated before and were friends throughout and got married two and

Trial: Findings of Fact and Conclusions of Law

4

1 a half years later is not by itself or even in conjunction with
2 everything else here enough evidence that there was a plan.

3 Most important here, I believe that the debtor's
4 explanation of why he transferred the property and that he
5 really did transfer the property is, is more credible, more
6 believable than the inference that he retained secretly an
7 interest in the property.

8 Why did he part with – why would he really part with
9 the property for this price to this person at this time?

10 First of all, because of his pledge which happened
11 shortly before, the restaurant, even if it had some real value,
12 didn't have any easily realizable value to him at that time,
13 because of the pledge and the need, the fact that all the cash
14 proceeds were going to be sucked out of this property for quite
15 some time. He couldn't use that value soon.

16 The shares- – these shares of – subject to this kind
17 of pledge in that kind of restaurant wouldn't be readily
18 salable. He needed money. He – he had lost his job a couple
19 months earlier by virtue of this settlement. He brought money
20 later from the – from Ms. Dodson. He needed some money.

21 Helping her was – was not – helping her succeed in the
22 restaurant was helpful to him. Giving her an incentive to work
23 hard was helpful to him. And – and doing something good for her
24 was not – didn't – he was very close friends with her. He had a
25 good relationship with her. And he would naturally want to help

Trial: Findings of Fact and Conclusions of Law

5

1 her, even if he couldn't get something back later.

2 Now I am troubled to some extent by the fact that they
3 didn't disclose this transfer. I don't think that the failure
4 to disclose the transfer is a concealment of an interest, but it
5 is evidence that could be part of a plan to retain an interest
6 in the sense that if they never disclosed the transfer and
7 nobody ever caught them on anything, they could more easily
8 disavow it later.

9 But I think that that's not an overwhelming factor,
10 and I think is undercut by the fact that the evidence shows here
11 that they didn't disclose the transfer to YKF before the
12 bankruptcy was filed. And I think that that kind of behavior
13 would be inexplicable if they were trying to keep this transfer
14 a secret to just sort of ignore later.

15 The other thing that is at issue here is I don't think
16 this transfer makes sense as a secret transfer intended to stop
17 these creditors. It didn't stop the debtor's creditors in the
18 sense that his -- as I understand from what I've heard in this --
19 in this trial here, the two major creditors who are Mr. Triano
20 and YKF.

21 YKF already had a superior interest in the shares.
22 Mr. Triano was again going after Ms. Dodson as well as Mr.
23 Triano. And she wasn't the most likely target to transfer any --
24 any interest in to get it away from Mr. Triano.

25 So it's not -- it just doesn't look like a likely

Trial: Findings of Fact and Conclusions of Law

6

1 scheme to keep this as a – as a method to keep this away from
2 creditors. But the key thing here is that this really doesn't
3 look like a retained interest. There was an activity that was –
4 that happened later that showed that the debtor really not only
5 nominally got rid of the interest, inexplicably got rid of the
6 interest, and then acted like he was an owner later.

7 I think, though, the last point to know that is, is
8 that to the extent they are married now is, is possibly relevant
9 only in one way. And that is it shows that, you know, that
10 their relationship turn into something that was very, very
11 close, indeed, over time. That may or may not have been in the
12 cards in 2004. Nothing certain in matters like that.

13 And the fact that they were married down the road is,
14 you know, in – in the context of all these other facts doesn't
15 show that that there was secret intent here. And the fact that
16 the debtor may, over time get some sort of a community-property
17 interest in this property by virtue of her efforts doesn't prove
18 anything, because those aren't conditions that existed during
19 the – the year prior to the filing. And, of course, she's
20 getting a community property interest in anything he earns, too.
21 That's the way marriage is.

22 Now without – without a finding that there's a secret
23 interest here, there can't be a concealment of an interest. He
24 doesn't have an interest. He didn't have an interest. The only
25 interest he has is what he may be earning as a result of, you

Trial: Findings of Fact and Conclusions of Law

7

1 know, these completely new events of marriage in which he's also
2 contributing his own labors to the community.

3 And if there is no retained interest, there isn't any
4 failure to – there isn't any concealment of it. And I have to
5 find for the – for the debtor.

6 I'm not so sure, going to the other question, that
7 there's a concealment anyway, because – I mean this whole
8 concept is very hard to apply where there's no disclosure and
9 nothing is done to sort of throw creditors off the trail. But I
10 don't want to rely on it, because I think if there was – I think
11 if there really was a secret transfer of property to somebody, a
12 legal transfer of property – let's take the case of – what was
13 the name of your case again, *Hughes*?

14 MR. BYRNE: *Hughes* and *Lawson*.

15 THE COURT: Yeah. If – if the debtor there had been
16 able, without recording, to give the mother a security interest
17 that would be superior to the judgment lien – of course, she had
18 to record there to – to get priority.

19 But if there had been some sort of transfer and then
20 she hadn't really meant it, I think it would still be a
21 concealment of an interest that was intended to throw the
22 creditors off, because even if they found it then they'd have to
23 sue the third party.

24 So I'm really not going to rely on the – on whether
25 there's a concealment here are not. I think that's kind of a

Trial: Findings of Fact and Conclusions of Law

8

1 difficult concept to apply. This case isn't exactly like
2 Hughes, but I think that that isn't the difference. The real
3 problem here is, unlike Hughes, there was no activity that
4 evinced a retained interest in the property. That was present
5 in *Hughes*, and it's just not present here. I think he really
6 did get rid of it. Okay?

7 Mr. Belway, I'll do the — I'll do the form of
8 judgment. It's pretty simple to do. Okay?

9 MR. BYRNE: Thank you, Your Honor.

10 MR. BELWAY: Your Honor, thank you.

11 MR. BYRNE: Your Honor? For purposes of — I'll not
12 say we're going to do anything, but just for purposes of the
13 record, can we say that all the exhibits were entered in the
14 record or into the evidence?

15 THE COURT: Well, I certainly — I overruled the
16 objection on — the part of 16. I don't recall that there was
17 any — anything else that was objected to besides the one I dealt
18 with. I think they're all in.

19 Mr. Belway, am I missing something?

20 MR. BELWAY: 16 was the only one, I think, that didn't
21 get —

22 THE COURT: It was the first page of — the second
23 page —

24 MR. BELWAY: — the second page was 16.

25 THE COURT: — was 16. And I overruled your objection

Trial: Findings of Fact and Conclusions of Law

9

1 on that. I think I overruled your objection on another thing.
2 The foundation for everything else was pretty obvious except the
3 second page of 16. And I'm letting that in because of the way
4 in which you've represented that you got it from the corporation
5 and their failure to bring the witness here. Okay?

6 [COUNSEL]: Thank you, Your Honor.

7 THE COURT: All right.

8 THE CLERK: All rise.

9 (Proceedings were concluded at 3:28 p.m.)

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State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

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Susan Palmer
Palmer Reporting Services

Dated April 14, 2007

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Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER N. POPOV,

Debtor.

Case No. 05-32929

Chapter 7

YUGEN KAISHA, Y.K.F.,

Plaintiff,

v.

STEPHANIE DODSON,

Defendant.

Adv. Pro. No.:

**COMPLAINT TO AVOID AND RECOVER
FRAUDULENT TRANSFER AND FOR
INJUNCTIVE RELIEF**

YUGEN KAISHA, Y.K.F., a Japanese corporation (the "Plaintiff"), alleges that:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
2. This adversary proceeding is brought pursuant to Rule 7001, *et seq.* of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. §§ 544(b)(1), 548 and 550.

1 3. Venue in this Court is proper pursuant to 28 U.S.C. § 1409 as this adversary
2 proceeding arises under and in connection with the above-captioned case under 11 U.S.C. § 101, *et*
3 *seq.* (the “Bankruptcy Code”), which is pending in this District.

4 4. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(H).

5 **PARTIES AND BACKGROUND FACTS**

6 5. On September 6, 2005 (the “Petition Date”) Alexander N. Popov (the “Debtor”) filed a
7 voluntary petition for relief under Chapter 7 of the Bankruptcy Code, commencing the above-
8 captioned bankruptcy case (the “Bankruptcy Case”).

9 6. Thereafter, E. Lynn Schoenmann (the “Trustee”) became the duly appointed Chapter 7
10 Trustee to administer the Debtor’s bankruptcy estate (the “Estate”).

11 7. Prior to the filing of the Bankruptcy Case, the Debtor was the owner of record of
12 3,744,000 shares of common stock (the “Shares”) of Smart Alec’s Intelligent Food, Inc., a California
13 corporation (“Smart Alec’s”).

14 8. Plaintiff is informed and believes and thereon alleges that defendant Stephanie
15 Dodson, an individual (the “Defendant”), is the spouse of the Debtor and resides at 2032 Donald
16 Drive, Moraga, California 94556.

17 9. Plaintiff is informed and believes and thereon alleges that in or about August 2005, the
18 Debtor transferred all right, title and interest in the Shares to the Defendant.

19 10. On or about August 1, 2007, Plaintiff and the Trustee entered into an Assignment
20 Agreement, pursuant to an Order Authorizing and Approving Assignment of Personal Property to
21 Yugen Kaisha, Y.K.F. (the “Approval Order”), entered in the Bankruptcy Case on or about July 31,
22 2007, whereby the Trustee sold, transferred, assigned, granted and conveyed to Plaintiff, in exchange
23 for Plaintiff’s payment of \$30,000 to the Trustee and the Estate, all rights, claims, causes of action
24 and remedies of the Trustee and the Estate, or assertable thereby, to avoid and recover the Debtor’s
25 purported transfer of the Shares to Defendant and/or any subsequent transferee thereof as a fraudulent
26 transfer under any applicable law, including without limitation, Bankruptcy Code §§ 544(b), 548 and
27 550, and California Civil Code §§ 3439-3439.12, inclusive, and any and all right, title and interest of

the Estate in and to the Shares (the "Assigned Claims and Causes of Action"). True and correct copies of the Assignment Agreement and the Approval Order are attached hereto, respectively, as Exhibits 1 and 2 and incorporated herein.

11. Pursuant to the Assignment Agreement and Approval Order, Plaintiff has the right, *inter alia*, to enforce, sue on, settle and compromise the Assigned Claims and Causes of Action, including claims under §§ 544(b)(1), 548 and 550 of the Bankruptcy Code.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

(Avoidance and Recovery of Fraudulent Transfer under Bankruptcy Code § 548(a)(1)(A))

12. Plaintiff repeats, realleges and incorporates by reference the allegations contained in paragraphs 1 through 11 of this Complaint as though fully set forth herein.

13. Plaintiff is informed and believes and thereon alleges that in or about August 2005 the Debtor transferred all of his right, title and interest in and to the Shares to the Defendant for no consideration or nominal consideration of no more than \$12,500 (the "Transfer").

14. Plaintiff is informed and believes and thereon alleges that the Debtor made the Transfer with the actual intent to hinder, delay, or defraud all of the Debtor's then and future creditors by wrongfully removing the Shares as an asset of the Debtor's Estate shortly before the Petition Date to enable the Debtor and the Defendant to retain control of Smart Alec's, a valuable and profitable restaurant, to the exclusion of the Debtor's unsecured creditors.

15. Plaintiff is informed and believes and thereon alleges that the Defendant received the Transfer with knowledge that the Debtor intended to hinder, delay, or defraud all of his then and future creditors and actively participated and colluded with the Debtor in structuring and effecting the Transfer with the purpose of removing the Shares from the Estate and to thereby retain control of Smart Alec's to the exclusion of the Debtor's unsecured creditors.

16. Plaintiff is informed and believes and thereon alleges that in furtherance of the foregoing, the Debtor and the Defendant executed a Share Purchase Agreement for the Shares in or about August 2005 which they backdated to April 18, 2004 to make the Transfer appear less

1 fraudulent and to establish consideration for the Transfer based upon certain prior cash transfers from
 2 Defendant to the Debtor totaling \$12,500 which were originally made for an unrelated purpose. A
 3 true and correct copy of the Share Purchase Agreement is attached hereto as Exhibit 3 and
 4 incorporated herein by this reference.

5 17. Defendant did not receive the Transfer in good faith and did not pay reasonably
 6 equivalent value for the Transfer.

7 18. As reflected in the Debtor's bankruptcy schedules filed in the Bankruptcy Case, there
 8 are numerous general unsecured creditors of the Debtor who have allowable claims against him
 9 which claims were in existence at the time of the Transfer (the "Unsecured Creditors").

10 19. As a proximate result of the wrongful acts of the Debtor and the Defendant, the
 11 Transfer was fraudulent and must be declared null and void and set aside.

12 20. The Transfer, to the extent it is avoided pursuant to § 548 of the Bankruptcy Code,
 13 may be recovered by Plaintiff pursuant to § 550(a)(1) of the Bankruptcy Code.

14 **SECOND CAUSE OF ACTION**
 15 **(Avoidance and Recovery of Fraudulent Transfer under Bankruptcy Code §544(b)(1)**
 16 **and California Civil Code §3439.04(a)(1))**

17 21. Plaintiff repeats, realleges and incorporates by reference the allegations contained in
 18 paragraphs 1 through 20 of this Complaint as though fully set forth herein.

19 22. Based upon the foregoing, the Transfer is voidable by the Unsecured Creditors under
 20 California Civil Code §3439.04(a)(1) and is voidable by Plaintiff as assignee of the Trustee pursuant
 21 to Bankruptcy Code §544(b)(1).

22 **THIRD CAUSE OF ACTION**
 23 **(Avoidance and Recovery of Fraudulent Transfer under Bankruptcy Code §548(a)(1)(B))**

24 23. Pleading in the alternative, Plaintiff repeats, realleges and incorporates by reference
 25 the allegations contained in paragraphs 1 through 13, 17, 18 and 20 of this Complaint as though fully
 26 set forth herein.

27 24. The Transfer was to or for the benefit of the Defendant.

25. Plaintiff is informed and believes and thereon alleges that the Debtor received less than reasonably equivalent value in exchange for the Transfer.

26. Plaintiff is informed and believes and thereon alleges that Debtor was: (1) insolvent on the date of the Transfer, or became insolvent as a result of the Transfer; and/or (ii) engaged in business or a transaction for which any property remaining with the Debtor was an unreasonably small capital at the time of, or as a result of the Transfer.

**FOURTH CAUSE OF ACTION
(Avoidance and Recovery of Fraudulent Transfer under Bankruptcy Code § 544(b)(1)
and California Civil Code § 3439.05)**

27. Pleading in the alternative, Plaintiff repeats, realleges and incorporates by reference the allegations contained in paragraphs 1 through 13, 17, 18, 20 and 24 through 26 of this Complaint as though fully set forth herein.

28. Plaintiff is informed and believes and thereon alleges that at the time of the Transfer, the Debtor was insolvent or in the alternative such Transfer rendered the Debtor insolvent.

29. Based upon the foregoing, the Transfer is voidable by the Unsecured Creditors under California Civil Code § 3439.05 and is voidable by Plaintiff as assignee of the Trustee pursuant to Bankruptcy Code § 544(b)(1).

**FIFTH CAUSE OF ACTION
(Injunctive Relief under Rule 7065 of the Federal Rules of Bankruptcy Procedure and
California Civil Code § 3439.07)**

30. Plaintiff repeats, realleges and incorporates by reference the allegations contained in paragraphs 1 through 29 of this Complaint as though fully set forth herein.

31. At present there is nothing to prevent the Defendant from transferring some or all of the Shares and/or interests therein to third parties and/or from secreting or dissipating any proceeds from a sale or other disposition of the Shares.

32. Such acts, unless enjoined, will cause Plaintiff great or irreparable injury for which it has no adequate remedy at law.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. That the Transfer of the Shares to Defendant be set aside and declared null and void;

2. That the Defendant be required to transfer and deliver up the Shares to Plaintiff;
3. That Defendant and her representatives, attorneys, and agents be enjoined and restrained from selling, transferring, conveying, or otherwise disposing of any of the Shares or of any interest therein until Plaintiff's rights to the Shares have been fully adjudicated and that a temporary restraining order and preliminary injunction be granted to Plaintiff herein;
4. That the judgment herein be declared a lien on the Shares;
5. That an order be made declaring that the Defendant holds the Shares in trust for the Plaintiff;
6. That Defendant be required to account to Plaintiff for all profits and proceeds earned from or taken in exchange for the Shares and/or attributable to her equity interest in Smart Alec's based upon the Shares;
7. That if the Defendant has disposed of any of the Shares or any interest therein, that she be required to account to Plaintiff for the proceeds;
8. For compensatory damages according to proof;
9. For costs of suit incurred herein; and
10. For such other and further relief as the Court may deem proper.

Dated: September 5, 2007

NIXON PEABODY LLP

By: /s/ James S. Monroe
James S. Monroe
Attorneys for Yugen Kaisha, Y.K.F.

EXHIBIT 1

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT (this "Agreement") is made by and between E. Lynn Schoenmann, trustee (the "Trustee") of the Chapter 7 bankruptcy estate of Alexander N. Popov, bankruptcy case number 05-32929, and Yugen Kaisha, Y.K.F., a Japanese corporation ("YKF").

W I T N E S S E T H

WHEREAS, on September 6, 2005, Alexander N. Popov (the "Debtor") filed a voluntary petition for relief pursuant to Chapter 7 of the United States Bankruptcy Code (the "Bankruptcy Case") in the United States Bankruptcy Court, Northern District of California, San Francisco Division (the "Bankruptcy Court") and the Trustee was thereafter duly appointed to administer the Debtor's Chapter 7 bankruptcy estate (the "Estate");

WHEREAS, prior to the filing of the Bankruptcy Case, (a) the Debtor was the owner of record of 3,744,000 shares of common stock of Smart Alec's Intelligent Food, Inc., a California corporation, (the "Shares"), and (b) the Debtor purportedly sold all of his right, title, and interest in the Shares to Stephanie Dodson ("Dodson") for \$12,500; and

WHEREAS, the Trustee desires to sell to YKF, and YKF desires to purchase from the Trustee, the Assigned Property (as defined herein);

NOW, THEREFORE, in consideration of the recitals, mutual covenants and conditions contained herein, the parties agree as follows:

1. Definitions. The following capitalized terms shall have the meanings as set forth below:

"Assigned Property" means any and all rights, claims, causes of action and remedies of the Trustee and the Estate, or assertable thereby, to avoid and recover the Debtor's purported transfer of the Shares to Dodson and/or any subsequent transferee thereof as a fraudulent transfer under any applicable law, including, without limitation, Bankruptcy Code §§ 544(b), 548 and 550, and California Civil Code §§ 3439-3439.12, inclusive; and any and all right, title and interest of the Estate in and to the Shares.

"Proceeds" means whatever is recovered, collected, acquired, received, distributed or otherwise obtained on account of or with respect to the Assigned Property.

"Purchase Price" means \$30,000.00.

2. Effective Date. This Agreement shall become effective when (a) each of the parties hereto and their counsel shall have duly executed and delivered this Agreement, and (b) the Bankruptcy Court shall have entered an order approving this Agreement. The first business day on which all of the foregoing conditions have been satisfied shall be referred to herein as the "Effective Date."

3. Bankruptcy Court Approval. The Trustee shall have the obligation to file and serve an appropriate motion requesting Bankruptcy Court approval of this Agreement (the "Approval Order"). The parties shall cooperate as reasonably required in seeking the Approval Order. This Agreement is contingent upon entry of the Approval Order and, in the absence thereof, this Agreement is null and void. In the event an appeal is taken from the Approval Order, (a) YKF shall have the sole and complete responsibility to assume any defense of the appeal and shall bear any and all attorneys' fees, costs, expenses, losses, obligations, liabilities and damages that may be incurred in connection therewith, (b) the Trustee shall have no

obligation to defend such appeal, and (c) this Agreement shall nonetheless become effective and bind the parties as provided in paragraph 2 hereof.

4. Assignment and Purchase. Subject to the terms and conditions of this Agreement, the Trustee hereby agrees to sell, transfer, assign, grant and convey the Assigned Property to YKF, its successors and assigns, YKF agrees to purchase the Assigned Property from the Trustee, and YKF shall be solely entitled to exercise and enforce all rights with respect to the Assigned Property and to collect and receive any and all Proceeds.

5. Payment. In consideration of the sale and assignment of the Assigned Property, YKF shall pay the Purchase Price to the Trustee within 2 business days after the Effective Date in immediately available funds by wire transfer to an account specified in writing by the Trustee.

6. Representations and Warranties of Trustee. The Trustee represents and warrants that it has made no prior assignment of the Assigned Property or of any interest therein and that the Trustee is the sole owner thereof and has good title thereto, free and clear of all liens, claims and encumbrances of any kind and will transfer to YKF such title, free and clear of any liens or encumbrances of any kind.

7. YKF's Acknowledgements. YKF acknowledges to the Trustee that except as expressly set forth in this Agreement, the Trustee does not make, and hereby disclaims any and all, representation or warranties regarding the Assigned Property. YKF acknowledges and agrees that the Assigned Property is acquired by YKF for its own account and risk and that the sale of the Assigned Property to YKF is a sale without recourse against the Trustee and/or the Estate and without obligation of the Trustee and/or the Estate to repurchase the Assigned Property under any circumstances.

8. No Reliance; Independent Investigation. The undersigned agree that each party hereto in entering into this Agreement relies upon its own investigation and judgment in regard to all matters herein contained and that they have not relied on any representations made by the other parties, that this Agreement is made and entered into by each of the parties of its own volition, and each of the parties hereto warrants that this Agreement was made and entered into free of any duress, coercion, or undue influence from any source whatsoever.

9. Merger. It is expressly understood and agreed that this Agreement constitutes the complete and final agreement among the parties regarding the matters herein addressed. Any and all prior negotiations, representations, understandings or agreements, whether written or oral, among the parties, relating to the subject matter of this Agreement and the facts as set forth in the recitals hereto are terminated and shall be of no further force or effect.

10. Amendments. No amendment, modification, termination, or waiver of any provision of this Agreement shall in any event be effective unless the same shall be in writing and signed by all parties hereto.

11. Authority. Each of the parties to this Agreement has full authority and power to enter into this Agreement and this Agreement is the legal, valid and binding obligation thereof.

12. Drafting of Agreement. The undersigned agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to any interpretation of this Agreement.

13. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns.

14. Governing Law. This Agreement shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the State of California applicable to agreements made and to be performed wholly within the State of California, as well as any applicable United States bankruptcy law. The Bankruptcy Court shall retain jurisdiction over any disputes regarding this Agreement or enforcement of this Agreement.

15. Attorneys' Fees. In the event that any legal proceeding, of any kind or nature, is brought by any party concerning the enforcement or interpretation of this Agreement, or any rights and duties hereunder, the prevailing party shall be entitled to recover its attorneys' fees and costs incurred in said proceedings.

16. Counterparts. This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any of the parties hereto may execute this Agreement by signing any such counterparts. Photocopies or facsimiles of executed copies of this Agreement may be treated as originals.

17. Further Assurances. The parties and their counsel shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement.

18. Captions. The captions appearing at the commencement of the paragraphs hereof are descriptive only and for convenience of reference. Should there be any conflict, or apparent conflict, between any such caption and any paragraph at the head of which it appears, the content of the paragraph shall govern the construction of this Agreement.

19. Partial Invalidity. If any provision of this Agreement is found to be invalid by any court, the invalidity of such provision shall not affect the validity of the remaining provisions hereof.

20. Survival of Representations and Warranties. The representations and warranties made by the parties herein shall survive the performance of this Agreement.

21. Notice. Any notice, request, demand, or other communication required or permitted hereunder will be given in writing by first-class mail, postage prepaid, to the party(ies) to be notified. All communications will be deemed given when received. The addresses of the parties for the purposes of such communication are:

Trustee: E. Lynn Schoenmann
c/o Dennis D. Davis, Esq.
Goldberg, Stinnett, Meyers & Davis
44 Montgomery Street, Suite 2900
San Francisco, CA 94104

YKF: Yugen Kaisha, Y.K.F.
c/o James S. Monroe, Esq.
Nixon Peabody LLP
One Embarcadero Center
San Francisco, CA 94111

A party may change his or her address for purposes of notice hereunder only upon written notice to the other party as provided hereinabove.

[Signature Page Follows]

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SCHOENMANN

PAGE 01/01

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be duly executed on the date appearing opposite their names hereinbelow.

Dated: Aug 1, 2007

E. Lynn Schoenmann, Trustee of the
Chapter 7 Bankruptcy Estate of Alexander
N. Popov

By: [Signature]
E. Lynn Schoenmann

Dated: June 8, 2007

YUGEN KAISHA, Y.K.F.

By: [Signature]
Its: President

APPROVED AS TO FORM AND CONTENT:

Nixon Peabody LLP

By: [Signature]
James S. Monroe, Esq.
Attorneys for Yugen Kaisha, Y.K.F.

Goldberg, Stinnett, Meyers & Davis

By: [Signature]
Dennis D. Davis, Esq.
Attorneys for E. Lynn Schoenmann, Trustee

EXHIBIT 2

Entered on Docket

July 31, 2007

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



GOLDBERG, STINNETT, DAVIS & LINCHEY
A Professional Corporation
DENNIS D. DAVIS, ESQ. CA Bar #070591
44 Montgomery Street, Suite 2900
San Francisco, CA 94104
Telephone: (415) 362-5045
Facsimile: (415) 362-2392
Email: ddavis@gsmddl.com

Signed and Filed: July 30, 2007

A handwritten signature of Thomas E. Carlson in black ink, written over a horizontal line.

THOMAS E. CARLSON
U.S. Bankruptcy Judge

Attorneys for E. Lynn Schoenmann, Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER POPOV,

Debtor.

Case No. 05-32929

Chapter 7

**ORDER AUTHORIZING AND APPROVING ASSIGNMENT
OF PERSONAL PROPERTY TO YUGEN KAISHA, Y.K.F.**

Upon the Application for Entry of Order by Default Authorizing Sale of Personal Property to Yugen Kaisha, Y.K.F. for an order authorizing and approving the Trustee's assignment of personal property to Yugen Kaisha, Y.K.F., as more fully set forth in the Notice of Trustee's Assignment of Personal Property to Yugen Kaisha, Y.K.F. filed herein June 26, 2007, and the Declaration of Dennis D. Davis filed in support of said application, submitted, no objections or requests having been filed or served, following date and adequate notice on appropriate parties, and

GOOD CAUSE APPEARING THEREFOR,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Trustee's application is granted in its entirety.
2. On the terms set forth in the notice, this Court hereby authorizes and approves the

-1-

ORDER AUTHORIZING AND APPROVING ASSIGNMENT
OF PERSONAL PROPERTY TO YUGEN KAISHA, Y.K.F.
113282.DOC

1 Trustee's assignment of personal property to Yugen Kaisha, Y.K.F., pursuant to the terms of the
2 Assignment Agreement, a copy of which is attached as Exhibit "B" to the Declaration of Dennis Davis
3 filed in support of the application.

4 3. The Trustee is authorized to take any and all reasonably necessary steps to effectuate the
5 terms of this order.
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8 **END OF ORDER**
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-2-

ORDER AUTHORIZING AND APPROVING ASSIGNMENT
OF PERSONAL PROPERTY TO YUGEN KAISHA, Y.K.F.
113282.DOC

COURT SERVICE LIST

Dennis D. Davis, Esq.
Goldberg, Stinnett, Meyers & Davis
44 Montgomery Street, Suite 2900
San Francisco, CA 94104

Office of the U.S. Trustee
235 Pine Street, Suite 700
San Francisco, CA 94104-3401

E. Lynn Schoenmann
800 Powell Street
San Francisco, CA 94108

James S. Monroe, Esq.
Nixon Peabody LLP
Two Embarcadero Center, Suite 2700
San Francisco, CA 94111-3996

EXHIBIT 3

Share Purchase Agreement

THIS SHARE PURCHASE AGREEMENT (the "Agreement") made and entered into this 18th day of April, 2004 (the "Execution Date"),

BETWEEN

Alex Popov of 2015 Laguna Street #8, San Francisco, CA 94115
(the "Seller")

and

Stephanie Dodson of 5728 Owens Dr. 206 Pleasanton, CA 94588
(the "Purchaser")

BACKGROUND

- A. The Seller is the owner of record of an aggregate of 3,744,000 common shares (the "Shares") of Smart Alec's Intelligent Food, Inc. (the "Corporation").
- B. The Seller desires to sell the Shares to the Purchaser and the Purchaser desires to purchase the Shares from the Seller.

IN CONSIDERATION OF and as a condition of the parties entering into this Agreement and other valuable consideration, the receipt and sufficiency of which consideration is acknowledged, the parties to this Agreement agree as follows:

Purchase and Sale

1. The Seller agrees to sell and the Purchaser agrees to purchase all the residual rights, title, interest, and property of the Seller in the Shares for an aggregate purchase price of Twelve Thousand Five Hundred Dollars (\$12,500) (the "Purchase Price").
2. Payments by the Purchaser shall be as follows:
 - a. \$5,000 payable at the signing of this Agreement.
 - b. \$5,000 payable before December 31st, 2004
 - c. \$2,500 payable before March 31st, 2005

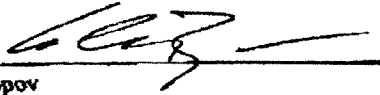
Representations and Warranties of the Seller

3. The Seller warrants and represents to the Purchaser as follows:
- The Shares are currently pledged as collateral for repayment of \$775,000 to the YKF Corporation.
 - The Purchaser is purchasing the residual value of the rights, title, and interest in the Shares after YKF is repaid a total of \$775,000 by December 31st, 2008.
 - The repayment of \$775,000 must occur before December 31st, 2008 or YKF may foreclose on the Shares.
 - Upon repayment to YKF, Purchaser shall become the rightful owner of the Shares and take immediate possession of the Shares.
 - Upon repayment to YKF, Purchaser shall be sole shareholder of the Corporation.
 - Except as provided in the incorporating documents of the Corporation or as indicated on the face of the certificates for the Shares, the Purchaser would not be prevented or restricted in any way from re-selling the Shares in the future.


Miscellaneous.

- The parties agree to cooperate with each other in executing and delivering all further documents necessary to effect the purchase and sale of the Shares, and both parties agree to cooperate with the other for purposes of effecting the other terms of this Agreement.
- All representations, warranties, covenants, and obligations in this Agreement will survive the Closing.
- The parties agree that the terms of this Agreement, and the discussion relating to this Agreement, are and shall remain privileged and confidential as between the parties.
- This Agreement contains the entire agreement of the parties hereto with respect to the purchase of the Shares and the other transactions contemplated herein, and supersedes all prior understandings and agreements of the parties with respect to the subject matters hereof.
- All notices, requests, consents and other communications required or permitted hereunder shall be in writing and shall be hand delivered or mailed postage prepaid by registered or certified mail or transmitted by facsimile transmission (with immediate telephonic confirmation thereafter).

IN WITNESS WHEREOF, each of the undersigned has duly executed, or caused its authorized officer to duly execute, this Agreement as of the date first set forth above.


 Alex Popov
 2015 Laguna Street #8
 San Francisco, CA 94115

4-18-04
 Date:


 Stephanie Dodson
 5728 Owens Dr. 206
 Pleasanton, CA 94588

4-18-04
 Date:



B104 (FORM 104) (08/07)

| ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse) | | ADVERSARY PROCEEDING NUMBER (Court Use Only) | | |
|---|---|--|---|---|
| PLAINTIFFS Yugen Kaisha, Y.K.F. | DEFENDANTS Stephanie Dodson | | | |
| ATTORNEYS (Firm Name, Address, and Telephone No.) James S. Monroe (State Bar No. 102328) Nixon Peabody LLP, One Embarcadero Center, 18th Floor San Francisco, CA 94111; Telephone: (415) 984-8200 | ATTORNEYS (If Known) | | | |
| PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee | PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee | | | |
| CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Complaint to avoid and recover fraudulent transfer of corporate stock by debtor to defendant and injunctive relief. 11 U.S.C. §§ 544(b)(1), 548 & 550. | | | | |
| NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.) | | | | |
| <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top; border: none;"> FRBP 7001(1) – Recovery of Money/Property <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input checked="" type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input checked="" type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny <div style="text-align: center;">(continued next column)</div> </td> <td style="width: 50%; vertical-align: top; border: none;"> FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input checked="" type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case) </td> </tr> </table> | | | FRBP 7001(1) – Recovery of Money/Property <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input checked="" type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input checked="" type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny <div style="text-align: center;">(continued next column)</div> | FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input checked="" type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case) |
| FRBP 7001(1) – Recovery of Money/Property <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input checked="" type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input checked="" type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny <div style="text-align: center;">(continued next column)</div> | FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input checked="" type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case) | | | |
| <input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law <input type="checkbox"/> Check if a jury trial is demanded in complaint | <input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23 Demand \$ According to proof | | | |
| Other Relief Sought | | | | |

B104 (FORM 104) (08/07), Page 2

| BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES | | |
|--|---|---|
| NAME OF DEBTOR Alexander N. Popov | BANKRUPTCY CASE NO. 05-32929 | |
| DISTRICT IN WHICH CASE IS PENDING Northern District of California | DIVISION OFFICE San Francisco | NAME OF JUDGE Thomas E. Carlson |
| RELATED ADVERSARY PROCEEDING (IF ANY) | | |
| PLAINTIFF | DEFENDANT | ADVERSARY PROCEEDING NO. |
| DISTRICT IN WHICH ADVERSARY IS PENDING | DIVISION OFFICE | NAME OF JUDGE |
| SIGNATURE OF ATTORNEY (OR PLAINTIFF) Nixon Peabody LLP By: /s/ James S. Monroe | | |
| DATE September 5, 2007 | PRINT NAME OF ATTORNEY (OR PLAINTIFF) James S. Monroe | |

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 104, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

B 250B (CANB)

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re ALEXANDER N. POPOV

Bankruptcy Case No.

05-32929

YUGEN KAISHA, Y.K.F.

Debtor

Adversary Proceeding No.

STEPHANIE DODSON

Plaintiff

Defendant

SUMMONS AND NOTICE OF STATUS CONFERENCE
IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the Clerk of the Bankruptcy Court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the complaint within 35 days.

Address of Clerk
United States Bankruptcy Court
235 Pine Street
San Francisco, CA 94104-2701

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Name and Address of Plaintiff's Attorney
James S. Monroe Esq. (SBN 102328)
Nixon Peabody LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94120

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

YOU ARE NOTIFIED that a status conference of the proceeding commenced by the filing of the complaint will be held at the following time and place.

| | |
|--|---------------|
| Address United States Bankruptcy Court Honorable Judge Thomas E. Carlson 235 Pine Street San Francisco, CA 94120 | Room 23 |
| | Date and Time |

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT. PLAINTIFF SHALL PROMPTLY SERVE A COPY OF THE BANKRUPTCY DISPUTE RESOLUTION PROGRAM INFORMATION SHEET ON ALL PARTIES. A COPY OF THE INFORMATION SHEET IS AVAILABLE ON THE COURT'S WEB SITE AT WWW.CANB.USCOURTS.GOV, AND THE CLERK'S OFFICE.

Clerk of the Bankruptcy Court

By:

Date

Deputy Clerk

Form ODIS

**UNITED STATES BANKRUPTCY COURT
Northern District of California****In Re:**
Alexander N. Popov
Debtor(s)

Case No.: 05-32929 Chapter: 7

Yugen Kaisha Y.K.F.
Plaintiff(s)
vs.
Stephanie Dodson
Defendant(s)

Adversary Proceeding No. 07-03104

ORDER RE INITIAL DISCLOSURES AND DISCOVERY CONFERENCE

The purpose of this order is: (1) to notify the parties of their obligation under Fed. R. Civ. P. 26, as incorporated by Fed. R. Bankr. P. 7026, to make Initial Disclosures and meet for a Discovery Conference; and (2) to modify those Rule 26 requirements in certain respects. As such, this order has no effect in any proceeding exempted under Rule 26(a)(1)(E) and (f) from the Initial Disclosure and Discovery Conference requirements.

1. The Discovery Conference. At least 21 calendar days before the status conference scheduled in the summons, the parties shall confer (in person or by telephone) at a "Discovery Conference." Plaintiff shall initiate contact regarding arrangement of the Discovery Conference. Defendant shall cooperate in fixing the time and place of the Discovery Conference. Except to the extent the parties stipulate otherwise, no party shall initiate or conduct any formal discovery prior to the Discovery Conference. The parties may conduct informal discovery.

2. Settlement. At the Discovery Conference, the parties shall consider the nature and basis of their claims and defenses and the possibility of an early settlement. The parties shall also discuss ADR options, as required by B.L.R. 9040-3.

3. Initial Disclosures. At the Discovery Conference, the parties shall arrange to make the "Initial Disclosures" required by Rule 26(a), without necessity of a formal discovery request. The Disclosures shall be made at or within 14 calendar days after the Discovery Conference. All disclosures shall be in writing, signed by the party or his or her attorney, and served on all other parties.

4. Discovery Plan. Unless:

(a) the proceeding is exempt under Rule 26(f);

(b) the proceeding seeks to recover money or property, or except a debt from discharge pursuant to 11 U.S.C. §523(a), of no more than \$15,000, excluding interest, attorneys, fees, and costs; or

(c) the parties stipulate to the contrary in a writing filed with the court; the parties shall, at the Discovery Conference, also develop a written Discovery Plan signed by all parties or their counsel, that reflects the parties' views and proposals concerning: (i) what changes, if any, should be made in the timing, form, or requirements of the Initial Disclosures; (ii) the timing, subject matter, and limitations, if any, of discovery to be conducted after the initial disclosures; and (iii) the subject of any orders that the court should enter under Fed.R.Bankr.P. 7016(b) and (c) and 7026(a)(1). The Discovery Plan shall be filed within 14 calendar days after the Discovery Conference.

5. Pretrial Disclosures. Notwithstanding Rule 26(a)(3), pretrial disclosures shall be made in accordance with further order of the court.

6. Service hereof. The summons, complaint, and this order shall be served by the plaintiff within 10 days of the date of this order. A return or proof of service shall be filed within 5 days after service.
SO ORDERED.

Dated: 9/6/07

For the Court:

Gloria L. Franklin
Clerk of Court
United States Bankruptcy Court

I certify that a copy of this Order was returned to the plaintiff at the time the original summons was issued.

Dated: 9/6/07Anna Cho-Wong
Deputy Clerk

B 250B (CANB)

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re ALEXANDER N. POPOV

Bankruptcy Case No.

05-32929

TC

YUGEN KAISHA, Y.K.F.

Debtor

Adversary Proceeding No.

STEPHANIE DODSON

Plaintiff

Defendant

07 3104 TC

SUMMONS AND NOTICE OF STATUS CONFERENCE

IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the Clerk of the Bankruptcy Court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the complaint within 35 days.

Address of Clerk
United States Bankruptcy Court
235 Pine Street
San Francisco, CA 94104-2701

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Name and Address of Plaintiff's Attorney
James S. Monroe Esq. (SBN 102328)
Nixon Peabody LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94120

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

YOU ARE NOTIFIED that a status conference of the proceeding commenced by the filing of the complaint will be held at the following time and place.

Address
United States Bankruptcy Court
Honorable Judge Thomas E. Carlson
235 Pine Street
San Francisco, CA 94120

Room
23

Date and Time

NOV 15 2007 *at 10:00am*

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT. PLAINTIFF SHALL PROMPTLY SERVE A COPY OF THE BANKRUPTCY DISPUTE RESOLUTION PROGRAM INFORMATION SHEET ON ALL PARTIES. A COPY OF THE INFORMATION SHEET IS AVAILABLE ON THE COURT'S WEB SITE AT WWW.CANB.USCOURTS.GOV, AND THE CLERK'S OFFICE.

GLORIA L. FRANKLIN

Clerk of the Bankruptcy Court

ANNA CHO-WONG

Deputy Clerk

SEP - 6 2007

Date



B 250B (CANB)

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re ALEXANDER N. POPOV

Bankruptcy Case No.

05-32929

TC

YUGEN KAISHA, Y.K.F.

Debtor

Adversary Proceeding No.

STEPHANIE DODSON

Plaintiff

Defendant

07 3104 TCSUMMONS AND NOTICE OF STATUS CONFERENCE
IN AN ADVERSARY PROCEEDING

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Address of Clerk
United States Bankruptcy Court
235 Pine Street
San Francisco, CA 94104-2701

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Name and Address of Plaintiff's Attorney
James S. Monroe Esq. (SBN 102328)
Nixon Peabody LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94120

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

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United States Bankruptcy Court
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235 Pine Street
San Francisco, CA 94120

Room
23

Date and Time

NOV 15 2007 *at 10:00 Am*

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GLORIA L. FRANKLIN

Clerk of the Bankruptcy Court

ANNA CHO-WONG

Deputy Clerk

SEP - 6 2007

Date



B250B

PROOF OF SERVICE

CASE NAME: IN RE ALEXANDER N., POPOV, Debtor;
ADV. PROCEEDING: YUGEN KAISHA, Y.K.F. v. STEPHANIE DODSON
COURT: U.S. Bankruptcy Court, Northern District of California
 (San Francisco)
CASE NO.: 05-32929-TC; Adv. Proc. No.: 07-3104-TC
FILE: 031405.000006

I, the undersigned, certify that I am employed in the City and County of San Francisco, California; that I am over the age of eighteen years and not a party to the within action; and that my business address is One Embarcadero Center, Suite 1800, San Francisco, CA 94111-3996. On this date, I served the following document(s):

- (1) **Summons and Notice of Status Conference in An Adversary Proceeding;**
- (2) **Complaint To Avoid and Recover Fraudulent Transfer and For Injunctive Relief;**
- (3) **Order Re Initial Disclosures and Discovery Conference;**
- (4) **Bankruptcy Dispute Resolution Program Information Sheet and Instructions For Parties;**
- (4) **ADR Certification; and**
- (6) **Certificate of Service of the Above Documents**

on the party stated below, placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

X : By First-Class Mail — I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

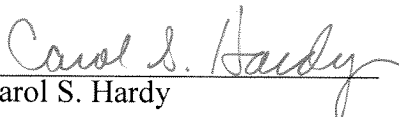
X : By Certified Mail Service — I am readily familiar with the firm's practice for collection and processing of correspondence for Certified Mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with Certified Mail postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

Addressee

Stephanie Dodson
 2032 Donald Drive
 Moraga, California 94556
 (Via U.S. Mail)

Stephanie Dodson
 c/o Smart Alec's Intelligent Food, Inc.
 2355 Telegraph Avenue
 Berkeley, CA 94704
 (Via Certified, Return Receipt Requested Mail)

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 7, 2007, at San Francisco, California.


 Carol S. Hardy

JOEL K. BELWAY [60556]
 THE LAW OFFICE OF JOEL K. BELWAY
 Professional Corporation
 235 Montgomery Street, Suite 668
 San Francisco, California 94104
 Telephone: 415-788-1702
 Facsimile: 415-788-1517

 Attorney for Defendant
 STEPHANIE DODSON

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

| | | |
|-----------------------|---|----------------------------|
| In re: |) | Case No. 05-32929 |
| |) | |
| ALEXANDER N. POPOV, |) | Chapter 7 |
| |) | |
| Debtor |) | |
| |) | |
| YUGEN KAISHA, Y.K.F., |) | A.P. No. 07-03104 |
| |) | |
| Plaintiff, |) | STIPULATION TO EXTEND TIME |
| |) | FOR ANSWER |
| vs. |) | |
| |) | |
| STEPHANIE DODSON, |) | |
| |) | |
| Defendant. |) | |

IT IS HEREBY STIPULATED by and between plaintiff, YUGEN KAISHA, Y.K.F., and defendant, STEPHANIE DODSON ("Dodson"), through their attorneys of record, that the time for Dodson to answer the complaint herein shall be extended, pursuant to Rule 9006-1(b) of the Bankruptcy Local Rules, to and including October 23, 2007.

STIPULATION TO EXTEND TIME FOR ANSWER

1 Dated: October 8, 2007

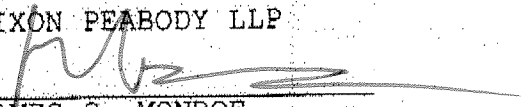
THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

2
3 
JOEL K. BELWAY

4 Attorney for Defendant

5 Dated: October 8, 2007

NIXON PEABODY LLP

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7 
JAMES S. MONROE

8 Attorney for Plaintiff

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STIPULATION TO EXTEND TIME FOR ANSWER

JOEL K. BELWAY [60556]
THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation
235 Montgomery Street, Suite 668
San Francisco, California 94104
Telephone: 415-788-1702
Facsimile: 415-788-1517

Attorney for Defendant
and Counterclaimant
STEPHANIE DODSON

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

| | |
|----------------------|---------------------------------------|
| In re: |) Case No. 05-32929 |
| |) |
| ALEXANDER N. POPOV, |) Chapter 7 |
| |) |
| Debtor. |) |
| _____ |) |
| YUGEN KAISAH, Y.K.F. |) A.P. No. 07-03104 |
| |) |
| Plaintiff, |) ANSWER TO COMPLAINT TO AVOID |
| vs. |) AND RECOVER FRAUDULENT |
| |) TRANSFER AND FOR INJUNCTIVE |
| STEPHANIE DODSON, |) RELIEF, COUNTERCLAIM AND |
| |) DEMAND FOR JURY TRIAL |
| Defendant. |) |
| _____ |) |
| STEPHANIE DODSON, |) |
| Counterclaimant, |) |
| vs. |) |
| |) |
| YUGEN KAISAH, Y.K.F. |) |
| |) |
| Claimant. |) |
| _____ |) |

COMES NOW defendant, STEPHANIE DODSON ("Defendant"), and in
answer to the Complaint to Avoid and Recover Fraudulent Transfer

and for Injunctive Relief ("Complaint") of plaintiff, YUGEN
1 KAISHA, Y.K.F. ("Plaintiff"), admits, denies and alleges as
2 follows:

3 **JURISDICTION AND VENUE**

4 1. Defendant denies the allegations of paragraph 1 of the
5 Complaint.

6 2. Defendant denies the allegations of paragraph 2 of the
7 Complaint.

8 3. Defendant denies the allegations of paragraph 3 of the
9 Complaint.

10 4. Defendant denies the allegations of paragraph 4 of the
11 Complaint.

12 **PARTIES AND BACKGROUND FACTS**

13 5. Defendant admits the allegations of paragraph 5.

14 6. Defendant admits the allegations of paragraph 6.

15 7. Answering paragraph 7, Defendant admits and alleges that
16 Alexander Popov ("Debtor") once owned 3,744,000 shares of common
17 stock ("Shares") of Smart Alec's Intelligent Food, Inc. ("Smart
18 Alec's") but transferred his residual interest in the Shares to
19 Defendant on April 18, 2004 pursuant to that certain Share
20 Purchase Agreement between Debtor and Defendant (the "Agreement")
21 dated April 18, 2004. Except as expressly admitted, Defendant
22 denies the allegations of paragraph 7.

23 8. Defendant admits the allegations of paragraph 8.

9. Defendant denies the allegations of paragraph 9, and alleges that this Court found at trial in Triano v. Popov, A.P. No. 05-3485 (the "Triano Adversary Proceeding") that Debtor transferred his residual interest in the Shares to Defendant on April 18, 2004. The Court's findings in the Triano Adversary Proceeding are incorporated herein by reference.

10. Defendant admits the allegations of paragraph 10.

11. Defendant lacks sufficient information or belief to answer the allegations of paragraph 11 of the Complaint, and upon such grounds denies such allegations.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

(Avoidance and Recovery of Fraudulent Transfer under Bankruptcy Code §584(a)(1)(A))

12. Answering paragraph 12 of the Complaint, Defendant repeats and incorporates by reference each admission, denial, and allegation contained in paragraphs 1 through 11 of this Answer as though set forth at length herein.

13. Answering paragraph 13 of the Complaint, Defendant admits and alleges that Debtor transferred his residual interest in the Shares to Defendant for \$12,500 on April 18, 2004, as found by the Court at trial in the Triano Adversary Proceeding. Except as expressly admitted, Defendant denies the allegations of paragraph 13.

14. Defendant denies the allegations of paragraph 14.

15. Defendant denies the allegations of paragraph 15.

16. Answering paragraph 16 of the Complaint, Defendant
1 admits and alleges that she and Debtor executed the Agreement on
2 April 18, 2004 and that a true and correct copy of the Agreement
3 is attached as Exhibit 3 to the Complaint. Except as expressly
4 admitted, Defendant denies the allegations of paragraph 16.

5 17. Defendant denies the allegations of paragraph 17.

6 18. Defendant admits the allegations of paragraph 18.

7 19. Defendant denies the allegations of paragraph 19.

8 20. Defendant denies the allegations of paragraph 20.

9
10 **SECOND CAUSE OF ACTION**

11 **(Avoidance and Recovery of Fraudulent Transfer Under Bankruptcy**
12 **Code §544(b)(1) and California Civil Code §3439.04(a)(1))**

13 21. Answering paragraph 21 of the Complaint, Defendant
14 repeats and incorporates by reference each admission, denial, and
15 allegation contained in paragraphs 1 through 20 of this Answer as
16 though set forth at length herein.

17 22. Defendant denies the allegations of paragraph 22.

18 **THIRD CAUSE OF ACTION**

19 **(Avoidance and Recovery of Fraudulent Transfer Under Bankruptcy**
20 **Code §548(a)(1)(B))**

21 23. Answering paragraph 23, Defendant repeats and
22 incorporates by reference each admission, denial and allegation
23 set forth in paragraphs 1-13, 17, 18, and 20 of this Answer as
24 though fully set forth herein.

25 24. Answering paragraph 24, Defendant admits and alleges
26 that the transfer of Debtor's residual interest in the Shares to
27 Defendant under the Agreement was to or for the benefit
28

of Defendant and Debtor. Except as expressly admitted, Defendant
1 denies the allegations of paragraph 24.

2 25. Defendant denies the allegations of paragraph 25.

3 26. Defendant denies the allegations of paragraph 26.

4 **FOURTH CAUSE OF ACTION**

5 **(Avoidance and Recovery of Fraudulent Transfer Under Bankruptcy**
6 **Code §544(b) (1) and California Civil Code §3439.05)**

7 27. Answering paragraph 23, Defendant repeats and
8 incorporates by reference each admission, denial and allegation
9 set forth in paragraphs 1-13, 17, 18, 20, and 24-26 of this
10 Answer as though fully set forth herein.

11 28. Defendant denies the allegations of paragraph 28.

12 29. Defendant denies the allegations of paragraph 29.

13 **FIFTH CAUSE OF ACTION**

14 **(Injunctive Relief under Rule 7065 of the Federal Rules of**
15 **Bankruptcy Procedure and California Civil Code §3439.07)**

16 30. Answering paragraph 30, Defendant repeats and
17 incorporates by reference each admission, denial and allegation
18 set forth in paragraphs 1-29 of this Answer.

19 31. Answering paragraph 31, Defendant admits and alleges
20 that there is no legal ground to prevent her from transferring
21 the Shares. Except as expressly admitted, Defendant denies the
22 allegations of paragraph 31.

23 32. Defendant denies the allegations of paragraph 32.

24 **FIRST AFFIRMATIVE DEFENSE**

25 The Complaint and each claim therein fail to state a claim
26 against Defendant upon which relief can be granted.
27
28

SECOND AFFIRMATIVE DEFENSE

1 The Court lacks jurisdiction over the claims asserted in the
2 Complaint.

3 **THIRD AFFIRMATIVE DEFENSE**

4 The Complaint and each claim therein are barred by the
5 unclean hands of the Plaintiff.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 The claims by Plaintiff are subject to offset and
8 recoupment.

9 **FIFTH AFFIRMATIVE DEFENSE**

10 The Plaintiff lacks standing in this Court to assert the
11 claims of the Complaint.

12 WHEREFORE, Defendant prays for judgment as follows:

13 1. That Plaintiff take nothing and for judgment in favor of
14 Defendant;

15 2. For costs of suit;

16 3. For reasonable attorneys fees to the extent allowed by
17 law; and

18 4. Such other and further relief as the Court may deem meet
19 in the premises.

20 Dated: October 23, 2007

21 THE LAW OFFICE OF JOEL K. BELWAY
22 Professional Corporation

23 /s/ Joel K. Belway

24 JOEL K. BELWAY

25 Attorney for Defendant

26 Stephanie Dodson

DEMAND FOR JURY

1 Defendant Stephanie Dodson hereby demands trial by jury.

2
3 Dated: October 23, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

4
5 /s/ Joel K. Belway
6 JOEL K. BELWAY
7 Attorney for Defendant
8 Stephanie Dodson

9 **COUNTERCLAIM**

10 1. Counterclaimant, Stephanie Dodson ("Counterclaimant"),
11 and counterdefendant, Yugen Kaisha, Y.K.F. ("Counterdefendant"),
12 were parties to that certain Closing Agreement re Payoff of
13 Secured Redemption Promissory Note dated March 12, 2007 ("Closing
14 Agreement") under which Counterclaimant paid off the balance of
15 certain obligations of Smart Alec's and Debtor to
16 Counterdefendant under agreements referred to in the Closing
17 Agreement, and herein, as the Settlement Documents.

18 2. The transaction between Counterclaimant and
19 Counterdefendant that closed under the Closing Agreement
20 involved, *inter alia*, a redemption of the Shares in consideration
21 for the payment of certain obligations of Smart Alec's and Debtor
22 to the Counterdefendant.

23 3. In or about the summer of 2006 Counterclaimant sought
24 to pay any sums owed to Counterdefendant under the Settlement
25 Documents. Counterclaimant is informed and believes and thereon
26 alleges that Counterdefendant, in bad faith, delayed and stalled
27
28

a closing of the transaction that closed under the Closing Agreement, causing Counterclaimant to pay approximately \$90,000, according to proof, more than she would have had to pay had Counterdefendant acted in good faith and closed the transaction when Counterclaimant originally sought to close.

4. Counterclaimant is informed and believes and thereon alleges that Counterdefendant's actions constituted a bad faith breach of contract, entitling Counterclaimant to general, special and punitive damages, according to proof.

WHEREFORE, Counterclaimant prays for judgment as follows:

1. For judgment in favor of Counterclaimant and against Counterdefendant for general, special and punitive damages, according to proof at trial;
2. Costs of suit incurred herein;
3. Attorneys fees to the extent allowed by law;
4. Such other and further relief as the Court may deem meet in the premises.

Dated: October 23, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

/s/ Joel K. Belway
JOEL K. BELWAY
Attorney for Counterclaimant
Stephanie Dodson

DEMAND FOR JURY

Counterclaimant Stephanie Dodson hereby demands trial by jury.

Dated: October 23, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

/s/ Joel K. Belway
JOEL K. BELWAY
Attorney for Counterclaimant
Stephanie Dodson

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DECLARATION OF SERVICE

1 I am over the age of eighteen years and not a party to the
2 within action. On October 23, 2007, I served the attached **Answer**
3 **to Complaint to Avoid and Recover Fraudulent Transfer and for**
4 **Injunctive Relief, Counterclaim and Demand for Jury Trial** on the
5 interested parties in this action by placing true copies thereof
6 in sealed envelopes and transmitting said envelopes to the
7 following addresses by the means indicated:
8

9 Via First-Class U.S. Mail

10 James S. Monroe, Esq.
11 Gregory E. Schopf, Esq.
12 NIXON PEABODY LLP
13 One Embarcadero Center, Suite 1800
14 San Francisco, CA 94111-3996

15 U.S. Trustee
16 235 Pine Street, Suite 850
17 San Francisco, CA 94104

18 I declare under penalty of perjury that the foregoing is
19 true and correct. Executed on October 23, 2007, at San
20 Francisco, California.

21 \s\ Joel K. Belway
22
23
24
25
26
27
28

James S. Monroe, Esq.
(State Bar Number: 102328)
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996
Telephone: (415) 984-8200
Facsimile: (415) 984-8300
E-mail: jmonroe@nixonpeabody.com

Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

Joel K. Belway
(State Bar Number 60556)
THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation
235 Montgomery Street, Suite 668
San Francisco, California 94104
Telephone: 415-788-1702
Facsimile: 415-788-1517
E-mail: belwaypc@pacbell.net

Attorneys for Defendant, Stephanie Dodson

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER N. POPOV,

Debtor.

Case No. 05-32929

Chapter 7

YUGEN KAISHA, Y.K.F.,

Plaintiff,

v.

STEPHANIE DODSON,

Defendant.

Adv. Pro. No.: 07-03104

JOINT DISCOVERY PLAN
[FRBP 7026(A) and FRCP 26(A)]
[PROPOSED]

Initial Status Conference

Date: November 15, 2007

Time: 10:00 a.m.

Place: Courtroom 23

235 Pine Street

San Francisco, CA 94104

Judge: Hon. Thomas E. Carlson

The parties by and through their counsel of record, hereby agree to the following discovery plan.

PROPOSED JOINT DISCOVERY PLAN

1. Changes to the Timing Form or Requirement For Initial Disclosures: The parties have agreed to exchange initial disclosures on or before November 20, 2007.

2. Timing, Subject Matter and Limitations of Discovery Subsequent to Initial Disclosures: Any discovery permitted pursuant to the Federal Rules of Bankruptcy Procedure shall be permissible after the initial disclosures are made except that depositions shall not be scheduled for a date prior to January 3, 2008.

3. Orders To Be Entered Pursuant to FRBP 7016 (b) and (c) and FRBP 7026(a)(1)(E): A scheduling order is requested as follows: all discovery to be completed within six months after the initial status conference (meaning that all responses to written discovery requests are due on or before this date and all deposition testimony must be completed on or before this date), except for discovery with respect to expert witnesses. A trial setting conference shall be set for shortly after the expiration of the discovery period, which shall deal with the disclosure of any expert witnesses, the discovery period for such expert witnesses, any BDRP referral, and a briefing and trial schedule. All potential dispositive motions shall be filed within 30 days of the expiration of the discovery period.

Dated: November 14, 2007

NIXON PEABODY LLP

By: /s/ James S. Monroe

James S. Monroe
Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.
THE LAW OFFICE OF JOEL K. BELWAY

Dated: November 14, 2007

By: /s/ Joel K. Belway

Joel K. Belway
Attorneys for Defendant, Stephanie Dodson

James S. Monroe, Esq. (State Bar Number: 102328)
Gregory E. Schopf (State Bar Number: 122862)
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996
Telephone: (415) 984-8200
Facsimile: (415) 984-8300
E-mail: jmonroe@nixonpeabody.com

Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER N. POPOV,

Debtor.

Case No. 05-32929

Chapter 7

YUGEN KAISHA, Y.K.F.,

Plaintiff,

v.

STEPHANIE DODSON,

Defendant.

Adv. Pro. No.: 07-03104

**MOTION OF YUGEN KAISHA, Y.K.F. TO
DISMISS COUNTERCLAIM FOR LACK
OF SUBJECT MATTER JURISDICTION**

Hearing

Date: December 21, 2007
Time: 9:30 a.m.
Place: Courtroom 23
Judge: Hon. Thomas E. Carlson

Introduction and Summary of Relief Requested

Yugen Kaisha, Y.K.F. ("YKF"), plaintiff in the above-captioned action, hereby submits this motion pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(1) of the Federal Rules of Civil Procedure for dismissal of the counterclaim filed herein by defendant Stephanie Dodson ("Dodson") for lack of subject matter jurisdiction on the grounds that there is no

1 independent jurisdictional basis for the counterclaim under 28 U.S.C. §1334(b) and it falls outside the
2 court's supplemental jurisdiction under 28 U.S.C. §1367(a).

3 YKF's complaint seeks to avoid and recover the debtor's prepetition transfer of 3,774,000
4 shares of common stock (the "Debtor's Shares") of Smart Alec's Intelligent Food, Inc., a California
5 corporation ("Smart Alec's") to Dodson as a fraudulent conveyance. YKF has the right to pursue this
6 avoidance action pursuant to an assignment agreement entered into with the Chapter 7 Trustee of the
7 debtor's bankruptcy estate which was authorized and approved by order entered herein on July 31,
8 2007. YKF maintains that the Debtor's Shares were transferred to Dodson shortly before the
9 September 6, 2005 petition date with the actual intent to hinder, delay or defraud the debtor's
10 creditors by removing said shares from the bankruptcy estate and thereby retaining control of Smart
11 Alec's to the exclusion of the debtor's creditors.

12 Dodson's counterclaim alleges a state law based contract claim regarding a Stock Redemption
13 Agreement, dated February 6, 2004, between Smart Alec's and YKF, whereby Smart Alec's agreed
14 to repurchase YKF's 1,440,000 shares of common stock of Smart Alec's (the "YKF Shares"). This
15 Stock Redemption Agreement was entered into as part of a Settlement Agreement entered into
16 between YKF, the debtor, Smart Alec's and Dodson, to settle a lawsuit filed by YKF regarding a
17 dispute concerning the accounting and management of Smart Alec's and the use of the funds YKF
18 invested in Smart Alec's to purchase the YKF Shares. Pursuant to the Settlement Agreement and
19 Stock Redemption Agreement, Smart Alec's agreed to repurchase the YKF Shares for \$775,000 as
20 provided therein. On March 12, 2007, the balance due under the Stock Redemption Agreement was
21 paid to YKF and the YKF Shares were transferred to Smart Alec's. Monroe Dec., ¶¶ 2-3.

22 By her counterclaim herein, Dodson alleges that YKF in some unexplained way delayed the
23 payoff of the amount due under the Stock Redemption Agreement, causing additional amounts to
24 have to be paid at the closing, and based thereon, seeks money damages from YKF. YKF denies this
25 allegation, but the truth or falsity thereof is immaterial to this motion.

Argument

A bankruptcy court has subject matter jurisdiction to adjudicate a counterclaim in an adversary proceeding only if there is an independent jurisdictional basis for the counterclaim as provided by 28 U.S.C. §1334(b) or it falls within the court's supplemental jurisdiction under 28 U.S.C. §1367(a).

Pursuant to 28 U.S.C. §1334(b), the bankruptcy court has jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." Dodson's counterclaim does not fall within any of these categories since it is based solely upon state law, exists apart from the bankruptcy case, and does not involve the debtor or the debtor's estate or have any conceivable potential impact on the bankruptcy estate. The counterclaim seeks money damages on behalf of Dodson only against YKF only. Accordingly, this dispute is not within the statutory grant of bankruptcy jurisdiction.

Likewise, Dodson's counterclaim is not within the bankruptcy court's supplemental jurisdiction under 28 U.S.C. §1367(a) (*See In re Pegasus Gold Corp.*, 394 F.3d 1189 (9th Cir. 2005). Supplemental jurisdiction extends only to those claims that are "so related to the (plaintiff's) claims...that they form part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C. §1367(a) (emphasis and parentheses added). This embodies a requirement that all claims arise from a "common nucleus of operative facts." *In re Pegasus Gold Corp.*, *supra*, at 1195; *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L.Ed. 2d 218 (1966). Applying this requirement here, it is clear that the aggregate of operative facts giving rise to Dodson's counterclaim (for breach of contract regarding YKF's post-petition sale of its shares of Smart Alec's to Smart Alec's) is entirely different from the facts supporting YKF's complaint (for avoidance of the debtor's prepetition transfer of his shares of Smart Alec's to Dodson). The complaint and counterclaim bear no logical relation to each other and rest upon different documentary, testimonial and other evidence. Accordingly, the counterclaim is not within the bankruptcy court's supplemental jurisdiction.

Conclusion

Based upon the foregoing authorities and argument, YKF respectfully requests that its motion to dismiss Dodson's counterclaim be granted and for such other relief as the court deems appropriate.

Dated: November 14, 2007

NIXON PEABODY LLP

By: /s/ James S. Monroe

James S. Monroe
Attorneys for Yugen Kaisha, Y.K.F.

James S. Monroe, Esq. (State Bar Number: 102328)
Gregory E. Schopf (State Bar Number: 122862)
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Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER N. POPOV,

Debtor.

Case No. 05-32929

Chapter 7

YUGEN KAISHA, Y.K.F.,

Plaintiff,

v.

STEPHANIE DODSON,

Defendant.

Adv. Pro. No.: 07-03104

**NOTICE OF HEARING ON MOTION OF
YUGEN KAISHA, Y.K.F. TO DISMISS
COUNTERCLAIM FOR LACK OF
SUBJECT MATTER JURISDICTION**

Hearing

Date: December 21, 2007
Time: 9:30a.m.
Place: Courtroom 23
Judge: Hon. Thomas E. Carlson

TO THE DEFENDANT, HER COUNSEL AND OTHER INTERESTED PARTIES:

NOTICE IS HEREBY GIVEN that on December 21, 2007, at 9:30 a.m., or as soon thereafter as this matter may be heard, in the Courtroom of the Honorable Thomas E. Carlson, United States Bankruptcy Judge, United States Bankruptcy Court, Courtroom 23, 235 Pine Street, San Francisco, California 94104, Yugen Kaisha, Y.K.F. will, and hereby does, move the Court for an Order for

MOTION TO DISMISS COUNTERCLAIM
ADV. CASE NO. 07-03104

10803755.1

1 dismissal of the counterclaim filed herein by defendant Stephanie Dodson for lack of subject matter
2 jurisdiction. This motion is made pursuant to Rule 7012 of the Federal Rules of Bankruptcy
3 Procedure and Rule 12(b)(1) of the Federal Rules of Civil Procedure and is made on the grounds that
4 there is no independent jurisdictional basis for the counterclaim under 28 U.S.C. §1334(b) and it falls
5 outside the court's supplemental jurisdiction under 28 U.S.C. §1367(a).

6 This motion is based upon this Notice, the Motion, and the Declaration of James S. Monroe
7 filed in support of this motion, and upon such further evidence and argument as may be presented
8 prior to or at the time of the hearing.

9
10 Dated: November 14, 2007

NIXON PEABODY LLP

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12
13 By: /s/ James S. Monroe
14 James S. Monroe
Attorneys for Yugen Kaisha, Y.K.F.
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James S. Monroe, Esq. (State Bar Number: 102328)
Gregory E. Schopf (State Bar Number: 122862)
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996
Telephone: (415) 984-8200
Facsimile: (415) 984-8300
E-mail: jmonroe@nixonpeabody.com

Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER N. POPOV,

Debtor.

Case No. 05-32929

Chapter 7

YUGEN KAISHA, Y.K.F.,

Plaintiff,

v.

STEPHANIE DODSON,

Defendant.

Adv. Pro. No.: 07-03104

**DECLARATION OF JAMES S. MONROE
IN SUPPORT OF MOTION OF YUGEN
KAISHA, Y.K.F. TO DISMISS
COUNTERCLAIM FOR LACK OF
SUBJECT MATTER JURISDICTION**

Hearing

Date: December 21, 2007
Time: 9:30 a.m.
Place: Courtroom 23
Judge: Hon. Thomas E. Carlson

I, James S. Monroe, declare as follows:

1. I am an attorney at law duly licensed and authorized to practice in the State of California and the above-entitled court and I am a partner of Nixon Peabody LLP, attorneys herein for Yugen Kaisha, Y.K.F. ("YKF"). The facts set forth in this declaration are within my personal

DECLARATION OF JAMES S. MONROE;
ADV. CASE NO. 07-03104

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1 knowledge as a result of my personal handling of the matters which are set forth herein. If called
2 upon to do so, I could and would competently testify thereto.

3 2. Attached hereto as Exhibit 1 and incorporated herein by this reference is a true and
4 correct copy of the February 6, 2004 Settlement Agreement and Release (excluding exhibits other
5 than the Stock Redemption Agreement) entered into between YKF, the debtor, Stephanie Dodson
6 ("Dodson"), and Smart Alec's Intelligent Food, Inc. ("Smart Alec's"), to settle a lawsuit filed by
7 YKF regarding a dispute concerning the accounting and management of Smart Alec's and the use of
8 the funds YKF invested in Smart Alec's to purchase 1,440,000 shares of common stock of Smart
9 Alec's (the "YKF Shares"). Pursuant to the Settlement Agreement and Stock Redemption
10 Agreement, Smart Alec's agreed to repurchase the YKF Shares for \$775,000 as provided therein.

11 3. Attached hereto as Exhibit 2 is a true and correct copy of the Closing Agreement re
12 Payoff of Secured Redemption Promissory Note which was executed by the undersigned and Dodson
13 in connection with the March 12, 2007 payment to YKF of the balance due under the Stock
14 Redemption Agreement and transfer of the YKF Shares to Smart Alec's.

15 I declare under penalty of perjury under the laws of the United States of America that the
16 foregoing is true and correct to the best of my knowledge, information and belief. Executed this 14th
17 day of November, 2007, at San Francisco, California.

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19 /s/ James S. Monroe
20 James S. Monroe
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DECLARATION OF JAMES S. MONROE;
ADV. CASE NO. 07-03104

-2-

EXHIBIT 1

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT ("Agreement") is entered into by YUGEN KAISHA, Y.K.F. ("YKF"), and SMART ALEC'S INTELLIGENT FOOD, INC. ("Smart Alec's"), ALEXANDER POPOV ("Popov") and STEPHANIE DODSON ("Dodson") (SMART ALEC'S, POPOV AND DODSON shall be referred to collectively herein as the "Defendants").

A. YKF is a Japanese corporation duly organized and existing under the laws of Japan. Smart Alec's is a corporation duly organized and existing under the laws of the state of California, located at 2355 Telegraph Avenue, Berkeley, California. Smart Alec's is engaged in the food service business. For the purposes of this Agreement, Smart Alec's refers to any franchise, subsidiary, or additional location of Smart Alec's, which is existing or may exist during the term of this Agreement. Alexander Popov and Stephanie Dodson are residents of the state of California and are or have been at one time, employees and/or officers of Smart Alec's.

B. YKF invested \$720,000 in Smart Alec's in exchange for 1,440,000 shares of common stock in Smart Alec's (the "YKF Shares") and full development rights ("Franchise Rights") of Alex Specialty Foods in the Japanese marketplace. Popov acted as the President and Chief Executive Officer of Smart Alec's and oversaw the day-to-day management of Smart Alec's. Popov enlisted the help of Dodson and, from time to time, Michael Popov, in the management of Smart Alec's affairs.

C. A dispute has arisen between YKF, the Defendants and Michael Popov regarding the accounting and management of Smart Alec's and the use of YKF's investment funds. Such dispute has become the subject of the lawsuit entitled, *Yugen Kaisha, Y.K.F., a Japanese Corporation v. Smart Alec's Intelligent Foods, Inc., Alex Popov, Stephanie Dodson, and Michael Popov*, Case. No. 2002-061123 (Alameda County, California) (the "Action").

D. YKF and Defendants have agreed to settle their dispute in accordance with the terms and conditions of this Agreement. YKF and Michael Popov have also agreed to settle their dispute in a separate settlement agreement.

E. As used herein, the term "Settlement Documents" shall mean and refer to each of the agreements and other documents referenced and/or attached hereto as exhibits and executed and delivered in connection with the transactions contemplated by this Agreement. The term "Agreement" as used herein shall include "Settlement Documents."

NOW, THEREFORE, incorporating the recitals set out above as part of this Agreement and in consideration of the mutual covenants contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties acknowledge and agree to the following:

1. Stock Redemptions.

a. To settle the Action, in consideration for YKF's original investment in the Corporation and a portion of its expenditure of reasonable attorneys' fees in pursuing the Action, Smart Alec's agrees to repurchase the YKF Shares from YKF and YKF agrees to sell and

transfer to Smart Alec's all of the YKF Shares ("The Transfer") for the amount of Seven Hundred Seventy Five Thousand Dollars (the "Purchase Price") pursuant to the terms of that certain stock redemption agreement ("Stock Redemption Agreement") and related secured promissory note (the "Redemption Promissory Note") in the form attached hereto as Exhibit A. Smart Alec's and YKF shall execute and deliver the Stock Redemption Agreement and Smart Alec's shall execute and deliver the Redemption Promissory Note at the Closing (as defined in Section 16 below). Also at the Closing, Smart Alec's shall execute and deliver an affidavit of non-USRPHC status in the form attached hereto as Exhibit B (the "Affidavit").

2. Security for The Transfer.

a. Proceeds from the Sale of the Baseball. Popov shall use his best efforts to fully cooperate with Smart Alec's and YKF to stake claim to, recover, and obtain the return of the proceeds from the sale of the baseball (the "Proceeds") to which Popov is entitled pursuant to the court order dated Wednesday, December 18, 2002 in the case *Popov v. Hayashi*, Case No. 4005435 (San Francisco). If and when the July 17, 2003 Preliminary Injunction restricting the use of such proceeds signed by Judge Garcia of the San Francisco Superior Court (the "Court") in the case *Triano v. Popov, et al.*, Case No. CPF 03503194 is lifted, and to the extent the Court allows Popov to retain all or any portion of the Proceeds, Popov hereby agrees that eighty five thousand dollars (\$85,000) of such Proceeds, shall be returned to Smart Alec's and deposited into the corporate account, and shall reflect a repayment of debt owed by Popov to Smart Alec's.

b. Popov's Shares in Smart Alec's. At the Closing, Popov shall execute and deliver a pledge agreement in the form attached hereto as Exhibit C (the "Pledge Agreement"), pursuant to which Popov will grant to YKF, and YKF will take, a possessory security interest in Popov's shares of Smart Alec's stock (the "Popov Shares"). Also at the Closing, Popov shall deliver to YKF the original stock certificate evidencing his ownership of 3,744,000 shares of common stock in Smart Alec's and shall deliver the stock power required under the Pledge Agreement.

c. Guarantee by Popov. At the Closing, Popov shall execute and deliver a personal guarantee (the "Guarantee"), in the form attached hereto as Exhibit D, pursuant to which Popov personally guarantees up to the amount of \$285,000 the obligations of Smart Alec's under the Redemption Promissory Note and this Agreement. The Guarantee will expire in the event that: (i) Smart Alec's pays a total of \$285,000 to YKF; or (ii) if the Board of Directors of Smart Alec's decides to liquidate Smart Alec's before The Transfer is completed and full payment of the Purchase Price is made.

d. Assets of Smart Alec's. At the Closing, Smart Alec's shall execute and deliver a security agreement (the "Security Agreement"), in the form attached hereto as Exhibit E, pursuant to which Smart Alec's grants YKF a security interest in all of its assets, including but not limited to deposit accounts, intellectual property, Smart Alec's leasehold interest in the property located at 2355 Telegraph Avenue, Berkeley, California, inventory and equipment. Smart Alec's agrees to execute additional documents as reasonably necessary to effect YKF's security interest in Smart Alec's assets, including but not limited to a deposit account control agreement.

e. **Promissory Note by Smart Alec's.** At the Closing, Smart Alec's shall execute and deliver the Redemption Promissory Note in the form attached as Exhibit A in YKF's favor in the principal amount of Seven Hundred and ~~Seventy~~^{TWO} Thousand Dollars (\$772,000).

3. **Representations by Smart Alec's and Popov.** Smart Alec's and Popov, as an officer of Smart Alec's, represent and warrant to YKF that, as of the date of this Agreement, (a) all of the outstanding shares of Smart Alec's are owned as follows: 3,744,000 shares of common stock owned by Popov, 1,440,000 shares of common stock owned by YKF, and 576,000 shares of common stock owned by Michael Popov; and (b) there are no other classes of stock authorized by Smart Alec's for issuance. At the Closing, Smart Alec's and Popov shall execute and deliver to YKF a certificate in the form attached hereto as Exhibit F (the "Closing Certificate") dated as of the Closing and signed by Smart Alec's and Popov pursuant to which Smart Alec's and Popov represent and warrant that there shall have been no material breaches by Smart Alec's or Popov in the performance of any of their respective covenants and agreements in this Agreement, and each of the representations and warranties of Smart Alec's and Popov contained in this Agreement shall be true and correct as of the Closing as though made as of the Closing.

4. **Resignation From the Board of Directors and Election of New Board.** At the Closing, Popov and Dodson shall tender their written resignations (the "Director Resignations") from the Board of Directors of Smart Alec's and a new Board of Directors shall be elected in accordance with the bylaws of Smart Alec's. Popov and Dodson shall also tender their written resignations as officers of Smart Alec's (the "Officer Resignations"). Popov's resignation is attached hereto as Exhibit G and Dodson's resignation is attached hereto as Exhibit H.

5. **Consolidation of Popov's Promissory Notes.** At the Closing, Popov shall execute and deliver a new promissory note to Smart Alec's for \$85,000 consolidating certain debt owed by Popov to Smart Alec's (the "Consolidated Promissory Note") in the form attached hereto as Exhibit I.

6. **Legal Fees.** With respect to the \$21,123 of legal fees currently claimed by Triano against Smart Alec's, Popov and Dodson, YKF acknowledges that to the extent these are fees and costs adjudicated to be for services rendered to Smart Alec's or arising out of the Action, said fees and costs will remain a corporate obligation of Smart Alec's to the extent that they are owed at all.

7. **Stipulated Judgment.** At the Closing, YKF and Smart Alec's shall execute a Stipulation for Entry of Judgment (the "Stipulation") in the form attached hereto as Exhibit J. Execution on the judgment (the "Judgment") entered against Smart Alec's pursuant to the Stipulation shall be stayed until an Event of Default (as defined below) occurs. Any and all amounts received or recovered by YKF under the Settlement Documents shall be applied in partial satisfaction of the Judgment. After Smart Alec's fully performs its obligations under the terms of the Settlement Documents, YKF shall promptly execute and file an Acknowledgment of Full Satisfaction of the Judgment.

8. **Franchise Rights.** After Smart Alec's and Popov have fully performed all of their respective obligations under this Agreement and the Settlement Documents, The Transfer has

been completed and full payment of the Purchase Price has been made, YKF shall release the Franchise Rights to Smart Alec's.

9. Ownership of Proprietary Rights; Restrictions.

a. Popov and Dodson acknowledge that Smart Alec's name, the business reputation associated therewith, the methods and techniques employed by Smart Alec's, the knowledge of the services and methods of Smart Alec's, the menu and all items on the menu of Smart Alec's, the trade secrets, including without limitation, confidential information regarding the operational, sales, promotional and marketing methods and techniques of Smart Alec's, the opportunities, associations and experience established and acquired by Popov through Smart Alec's and other proprietary know-how (collectively, the "Proprietary Information"), are of considerable value. Popov and/or Dodson, while an employee of Smart Alec's, shall be permitted to use the Proprietary Information for the sole purpose of operating the business of Smart Alec's. If Popov or Dodson's employment with Smart Alec's is terminated for any reason, Popov and Dodson shall be permanently prohibited from using or disclosing, directly or indirectly, the Proprietary Information.

b. While Popov and/or Dodson is an employee or shareholder of Smart Alec's, Popov and/or Dodson shall not, directly or indirectly, (whether as principal, agent, independent contractor, partner or otherwise) own, manage, operate, control, finance, participate in, perform services for, consult with or otherwise carry on, a business similar to or competitive with Smart Alec's business anywhere within a sixty (60) mile radius of any Smart Alec's location; provided, however, that nothing set forth in this Section 12(b) shall prohibit Popov and/or Dodson from owning not in excess of 5% in the aggregate of any class of capital stock of any corporation if such stock is publicly traded and listed on any national or regional stock exchange or reported on the Nasdaq Stock Market.

c. The foregoing covenants shall be deemed severable and, if part shall be legally enforceable and part legally unenforceable, only the enforceable parts shall apply. In the event of breach hereof, Popov and Dodson consent to the issuance of an injunction enjoining Popov and/or Dodson from continuing any association with a competitive business or disclosing or using any Proprietary Information in violation of the terms hereof. In addition to said injunctive remedy, Smart Alec's shall be entitled, as liquidated damages, to all amounts earned or received by Popov or Dodson for a period of one year following the breach or violation of this Section 12.

d. The Parties agree to negotiate an employment contract for Dodson.

e. The Parties acknowledge that Popov has been an at will employee of Smart Alec's. The Parties agree that Popov can continue his employment until April 30, 2004 on an at will basis and will be paid his current salary of \$7,000 per month.

10. Dismissal of Dodson and Popov.

At Closing, YKF shall deliver fully executed Dismissals of Dodson, Popov and Does 1-25 in substantially the same form as Exhibit K attached hereto. Dodson and Popov shall promptly cause such dismissals to be filed with the Alameda County Court.

11. **Further Assurances.** Popov and Smart Alec's agree to execute additional documents as are reasonably necessary to effectuate the transactions and agreements contemplated in this Agreement.

12. **Default.** Upon the happening of any one of the following conditions or events ("Events of Default") and upon written notice by YKF at anytime after the occurrence of an Event of Default, Popov and Smart Alec's shall be declared in default of this Agreement ("Default"):

a. **Failure to Pay.** Failure to pay any Future Periodic Transfer (as that term is defined in the Stock Redemption Agreement attached hereto as Exhibit A) on or before the fifteenth day of the month when due. If the fifteenth day of any month falls on a weekend or holiday, the payment for that month is then due on the first business day thereafter.

b. **False Statement.** Any warranty, representation or statement made or furnished to YKF by or on behalf of Popov and/or Smart Alec's in connection with this Agreement or any of the Settlement Documents proving to have been false in any material respect when made or furnished.

c. **Insolvency and Bankruptcy.** Insolvency, or the commencement of any proceeding under bankruptcy or insolvency laws by Smart Alec's.

d. **Other Breach.** Any material breach by Popov and/or Smart Alec's of any of their respective covenants, agreements, representations or warranties contained in this Agreement; any material breach by Popov and/or Smart Alec's of any of their respective covenants, agreements, representations or warranties contained in any of the Settlement Documents; and failure to comply with the Further Assurances as provided in Section 11.

e. **Maintenance of Business.** If Smart Alec's and/or Popov take any actions outside the ordinary course of business of Smart Alec's without the prior written consent of YKF.

13. **Remedies Upon Default.** Upon the occurrence of an Event of Default, and written notice by YKF to Popov and Smart Alec's as provided in Section 12, YKF may declare all or any part of the obligations of Popov and Smart Alec's to YKF immediately due and payable in full, may foreclose on the Popov Shares and any other personal or real property in which YKF holds a security interest pursuant to the Settlement Documents, may execute upon and otherwise enforce the Judgment and may exercise any and all rights and remedies available to YKF under applicable law and /or any of the Settlement Documents. Notwithstanding the foregoing, upon the occurrence of an Event of Default by Smart Alec's, Popov may purchase the remaining YKF Shares that have not yet been redeemed by Smart Alec's under the Stock Redemption Agreement in exchange for Popov's cash payment to YKF of the remaining balance of the Purchase Price for the YKF Shares no later than fourteen (14) days after the occurrence of the Event of Default.

14. **Releases of Claims.**

a. **Release of Parties on Satisfaction of Obligations and Conditions in this Agreement.** Effective upon the satisfaction of all obligations and conditions contained in this Agreement, the Parties hereby fully releases and forever discharge each other and their respective successors, assigns, transferees, affiliates, subsidiaries, parents, partners, and their

attorneys, representatives, agents, officers, directors, accountants, auditors, shareholders and employees, of, from and on account of any and all claims, demands, actions, charges, causes of action, suits, liabilities, obligations, promises, contracts, agreements, damages, losses, expenses, costs (including but not limited to attorneys' fees and costs actually incurred) of whatever nature and kind, wherever filed or prosecuted, and whether or not yet asserted, including without limitation, any claim, known or unknown, suspected or unsuspected, and any liability alleged as a result of actions undertaken, done, or omitted to be done up to and including the date of this Agreement, which are related to or in any manner incidental to any claims, matters or allegations which were asserted or might have been asserted in the Action. Notwithstanding the release set forth in this Section 14(a), such release shall not apply to any claims arising from or with respect to any alleged breach of any representation or warranty or nonperformance of this Agreement.

b. Waiver of Provisions of California Civil Code Section 1542. The parties hereto, and each of them, hereby warrant, represent, and agree that each of them is fully aware of the provisions of California Civil Code Section 1542, which provides as follows:

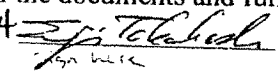
“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

The parties hereto, and each of them, voluntarily waive the provisions of California Civil Code Section 1542, and any other similar law, as to any and all claims, demands, causes of action, or charges of whatever nature, known and unknown, and further agree that this waiver is a material aspect of the consideration for entering this Agreement.

15. Preservation of Nondischargeability Actions. If, prior to the satisfaction of Popov's obligations under the Guarantee pursuant to which Popov personally guarantees up to the amount of \$285,000, and the obligations of Smart Alec's under the Redemption Promissory Note and this Agreement, a bankruptcy case is filed by or against Popov under the United States Bankruptcy Code, neither this Agreement nor the releases and dismissals provided for herein shall be construed to alter, waive, release, limit, bar or prejudice in any way the rights, if any, of (a) YKF to assert a nondischargeability action against Popov, up to \$285,000, pursuant to 11 U.S.C. § 523 with respect to the subject matter of the Action or any other matter, or (b) Popov to oppose any such action on any and all available grounds.

16. Closing.

a. Place and Time. Upon the terms and subject to the satisfaction of the conditions set forth in this Agreement, the consummation of the transactions contemplated by this Agreement (the "Closing") shall take place at the law offices of Nixon Peabody LLP, Two Embarcadero Center, San Francisco, California 94111, by the execution (if applicable) and upon delivery, on a mutually agreeable date and time not later than ~~December 1, 2003~~, of the documents and funds described in this Section 16.

February 6, 2004 
 Spiros T. Tolakidis
 Counsel for Defendants

b. Defendants' Closing Deliveries. At the Closing, the Defendants shall deliver or cause to be delivered to YKF each of the following:

- i. The sum of three thousand dollars (\$ 3,000) in the form of a certified cashier's check made payable to Yugen Kaisha, Y.K.F. in accordance with Section 1(a);
 - ii. The Stock Redemption Agreement and Redemption Promissory Note as referenced in Section 1(a) and attached hereto as Exhibit A, executed by Smart Alec's;
 - iii. The Affidavit as referenced in Section 1(a) and attached hereto as Exhibit B, executed by Smart Alec's;
 - iv. The Pledge Agreement as referenced in Section 2(b) and attached hereto as Exhibit C, executed by Popov;
 - v. The stock power required in Section 2(b) above and accompanying original stock certificate;
 - vi. The Guarantee as referenced in Section 2(c) and attached hereto as Exhibit D, executed by Popov;
 - vii. The Security Agreement as referenced in Section 2(d) and attached hereto as Exhibit E, executed by Smart Alec's;
 - viii. The Closing Certificate as referenced in Section 3 and attached hereto as Exhibit F, executed by Smart Alec's and Popov;
 - ix. As referenced in Section 4, the Director Resignations attached hereto as Exhibit G and Officer Resignations attached hereto as Exhibit H, executed by Popov and Dodson;
 - x. The Consolidated Promissory Note as referenced in Section 5 and attached hereto as Exhibit I, executed by Popov;
 - xi. The Legal Fees for Consideration to be prepared by Popov; and
 - xii. The Stipulation for Entry of Judgment as referenced in Section 7 and attached hereto as Exhibit J, executed by Smart Alec's;
 - xiii. This Agreement, executed by Smart Alec's, Popov and Dodson; and
 - xiv. The leasehold deed of trust and deposit account control agreement as referenced in Section 2(d), executed by Smart Alec's.
- c. YKF's Deliveries.
- i. The Stock Redemption Agreement, executed by YKF;
 - ii. The Dismissals of Dodson, Popov and Does 1-25 as referenced in Section 10 and attached hereto as Exhibit K, executed by YKF; and

iii. This Agreement, executed by YKF.

17. **Notice.** Any and all notices, demands, requests or other communications required or permitted by this Agreement or by law to be served on, given to or delivered to any party to this Agreement by an other party to this Agreement shall be in writing, unless specified otherwise, and shall be deemed duly served, given, received or delivered when transmitted to the person indicated below:

If to YKF:

Yugen Kaisha Y.K.F.
c/o Brian Baymiller
Fuji Silysia Chemical LTD
1000 Park Forty Plaza, Suite 290
Durham, NC 27713

With a copy to:

George H. Pretty, II
PARKER, POE, ADAMS, & BERNSTEIN, L.L.P.
401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202

If to DEFENDANTS:

Smart Alec's Intelligent Food, Inc.
2355 Telegraph Avenue
Berkeley, CA 94704

18. **Confidentiality.**

a. It is a material inducement for the parties to enter into this compromise and settlement of their disputes and differences that such disputes and differences, and the terms and provisions of this Agreement, shall be, and remain, strictly confidential. Accordingly, neither this Agreement, nor any of its terms, shall be disclosed to any person, except that this Agreement and its terms may be disclosed: (a) as required by law or court order; (b) to counsel, accountants, and auditors of any of the parties hereto; (c) in any action or proceeding where the existence or terms of the Agreement are at issue; or (d) by written agreement of the parties. If this Agreement or its terms are disclosed, the party disclosing such information shall give prior written notice thereof to each of the other parties hereto. Furthermore, the party disclosing such information shall advise the recipient of the provisions of this section.

b. Notwithstanding any prohibition on disclosure in Section 19(a) above, nothing in this Agreement shall preclude YKF or Popov from disclosing to Martin F. Triano and his counsel the substance of the provision in Section 1(e) of the Stock Redemption Agreement (attached hereto as Exhibit A) regarding the use of baseball sale proceeds to make payments hereunder.

20. **General Provisions.**

a. **Assignment.** Neither this Agreement nor any of the rights or obligations of any of the Defendants hereunder may be assigned or pledged by any of them without the written

consent of YKF, and no such assignment by any of them shall relieve it or him of its or their obligations hereunder.

b. **No Admission of Liability.** The parties acknowledge that this Agreement is a settlement of disputed claims, and that this Agreement is not an admission of liability by either party to the other, which liability is denied by all parties.

c. **Enforceability.** Each of the parties acknowledges that they have been represented by competent counsel in reviewing and deciding to enter into this Agreement. Further, each party acknowledges reading this entire document, understanding its terms and effects, and that this Agreement is being signed freely by each party.

d. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of California, excluding its conflict of laws principles.

e. **Entire Agreement.** This Agreement represents the entire understanding between the parties with respect to the settlement of the dispute between them, and it supersedes all prior discussions, representations, and/or negotiations. This Agreement may not be amended except in writing and signed by an authorized representative of both parties.

f. **Binding Agreement.** This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their heirs, successors, and permitted assigns.

g. **Attorneys' Fees.** In any action brought by YKF or the Defendants to enforce the terms of this Agreement, or any agreement, document or instrument related to this Agreement or incorporated into this Agreement by exhibit or otherwise, the party who prevails in such action to enforce this Agreement shall be entitled to recover its costs and attorney's fees from the other party.

h. **Force Majeure.** No party shall be responsible for any delay or failure in performance of any part of this Agreement to the extent such delay or failure is caused by fire, flood, explosion, war, acts of terrorism, organized union or third party labor dispute, embargo, governmental action or failure to act, the act of any civil or military authority, act of God or by any other similar causes beyond its reasonable control.

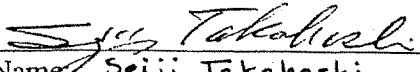
i. **Severability.** Should any of the provisions of this Agreement be rendered invalid by a court or government agency of competent jurisdiction, it is agreed that this shall not in any way or manner affect the enforceability of the other provisions of this Agreement which shall remain in full force and effect.

j. **Execution in Counterparts.** YKF and the Defendants agree that this Agreement may be executed in counterparts and that it is the intent of YKF and the Defendants that a copy of this Agreement signed by either YKF, Popov, Smart Alec's and/or Dodson shall be fully enforceable against that party.

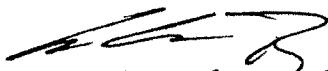
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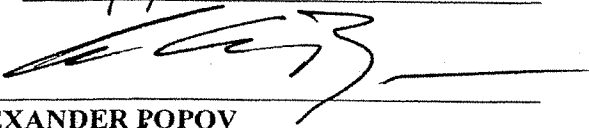
This Agreement is entered into, executed, and becomes effective on the date of the last signature by the parties' authorized representatives as set out below.

YUGEN KAISHA, Y.K.F.

By: 
Printed Name: Seiji Takahashi
Title: President + CEO
Date: _____

SMART ALEC'S INTELLIGENT FOOD, INC.

By: 
Printed Name: Alex Popov
Title: CEO
Date: 2/6/04


ALEXANDER POPOV
Date: 2/6/04


STEPHANIE DODSON
Date: 2.6.04

A.

STOCK REDEMPTION AGREEMENT

S528180.1

STOCK REDEMPTION AGREEMENT

THIS STOCK REDEMPTION AGREEMENT, made as of February 9, 2004 (the "Agreement"), by and between SMART ALEC'S INTELLIGENT FOOD, INC., a California corporation (the "Company"), and YUGEN KAISHA, Y.K.F., a shareholder of the Company (the "Seller").

WHEREAS, the Seller owns 1,440,000 shares of the issued and outstanding voting common stock of the Company (the "Shares");

WHEREAS, each of the Seller and the Company desires the Company to purchase and redeem the Shares pursuant to this Agreement;

WHEREAS, capitalized terms used in this Agreement but not otherwise defined shall have the meanings set forth in that certain settlement agreement of even date herewith (the "Settlement Agreement") by and among the Seller, the Company, Alexander Popov, and Stephanie Dodson.

NOW, THEREFORE, in consideration of the promises and the mutual covenants and agreements hereinafter contained, the parties agree:

1. Redemption of Shares. The Company hereby agrees to redeem and purchase from the Seller and the Seller hereby agrees to transfer and sell to the Company the Shares ("The Transfer"). In consideration for The Transfer, the Company will remit to the Seller the purchase price of Seven Hundred and Seventy Five Thousand Dollars (\$775,000) (the "Purchase Price"). The Purchase Price shall be due and payable as follows:

(a) Concurrent with the Closing under the Settlement Agreement, the Company shall transfer by wire to the account below the amount of Three Thousand Dollars (\$3,000) (the "Initial Transfer"):
by check # 5520 from Bank of America
Bank: _____
Location: _____
Account No.: _____
ABA No.: _____
Attn.: _____

(b) Concurrent with the Closing under the Settlement Agreement, the Company shall execute and deliver a secured promissory note for the benefit of the Seller in the amount of Seven Hundred Seventy Two Thousand Dollars (\$772,000) (the "Redemption Promissory Note") in the form attached hereto as Exhibit A.

As provided below, the Company shall make monthly transfers (the "Transfers") no later than the fifteenth (15th) of each month to the bank account set forth in Section 1(a) above (the "Transfer Account"). The Transfers will accumulate in the Transfer Account until such time as

S417256.4

the amount of funds in the Transfer Account is sufficient for the Company to redeem more than 20% of the Company's common stock then owned by the Seller (the "**First Redemption**"). After the First Redemption, the Seller shall continue to accumulate the Transfers in the Transfer Account until such time as the amount of funds in the Transfer Account is sufficient for the Company to redeem more than 20% of the Company's common stock then owned by the Seller (each, a "**Subsequent Redemption**"). The Seller shall repeat this process for Subsequent Redemptions until all of the Seller's common stock in the Company has been redeemed.

Upon receipt of the Initial Transfer and all payments due under the Redemption Promissory Note, the Seller shall deliver to the Company Share Certificate No. 1 of the Company evidencing the Seller's ownership of the Shares together with a stock power duly executed by the Seller.

(c) The remaining amount of transfers totaling seven hundred fifty thousand dollars (\$750,000) shall be made payable in monthly transfers to the Transfer Account no later than the 15th of every month, beginning the month after the execution of this Agreement ("**Future Periodic Transfer**"), and shall consist of 100% of Smart Alec's "Available Cash Flow", and shall be referred to at all times as "**Cash Flow Payable to YKF**". The Future Periodic Transfer shall be completed by no later than December 31, 2008. For the purpose of this Agreement, Available Cash Flow shall mean the gross receipts of Smart Alec's (including but not limited to: sales of food and beverages, repayment of interest and principal on loans receivable, the net proceeds of any lawsuit settlement, judgment or award, and the conversion to cash of any real personal, or intangible property owned or acquired by Smart Alec's during anytime in the term of this Agreement) reduced by payments made in the ordinary course of business (including but not limited to: rent, utilities, liability, hazard and workers' compensation insurances, salary and benefit expenses, income, property, sales and payroll taxes, costs of goods sold, and other costs incurred as a necessity in running the day-to-day operations of the business) and further reduced by any capital expenditures or operating reserves or accruals approved by the Board of Directors of Smart Alec's. Specifically excluded from the foregoing definition are legal fees in conjunction with the defense of Alex Popov, Michael Popov and/or Dodson in any shareholder action.

(d) The transfer terms described above in Subsections 1(a)-(c) do not in anyway prohibit the payment in full of the Purchase Price (or the remaining portion of the Purchase Price) to the Seller on behalf of the Company by any of the Defendants or any other third party.

(e) YKF and Defendants agree, and Popov warrants, that no payments under this Agreement will be made from those baseball sale proceeds that are the subject of the July 17, 2003 Preliminary Injunction restricting the use of such proceeds signed by Judge Garcia of the San Francisco Superior Court in the case *Triano v. Popov, et al.*, Case No. CPF 03503194, during the time that such Preliminary Injunction is in effect. YKF will not authorize Smart Alec's to incur unnecessary or extraordinary fees for forensic accounting, litigation or consulting services.

2. Representations and Warranties of the Seller. The Seller hereby represents and warrants to the Company that:

(a) At the time of the execution of this Agreement, the Seller is, and at the time of the delivery of the Shares to the Company, the Seller will be, the record and beneficial owner of the Shares, free of any and all liens, options, pledges, security interests, or restrictions of any kind;

(b) The Shares represent all of the ownership interest of the Seller in the Company; and

(c) This Agreement constitutes the valid and legally binding obligation of the Seller.

3. Representations and Warranties of the Company. The Company hereby represents and warrants to the Seller that:

(a) The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of California and has full corporate and other power and authority to conduct its business and own its properties as now conducted and owned;

(b) This Agreement constitutes the valid and legally binding obligation of the Company.

4. Survival of Representation, Warranties, Covenants and Agreements. The representations, warranties, covenants and agreements of the parties hereto shall survive the closing of the transactions contemplated in this Agreement.

5. Entire Agreement. This Agreement and the other instruments to be executed and delivered pursuant hereto contain the entire agreement by and between the parties with respect to the transactions contemplated herein and may not be changed, modified or amended, except in writing signed by the parties.

6. Waiver. Unless otherwise expressly provided herein, no delay or omission by the parties hereto in exercising any right or remedy provided for herein shall constitute a waiver of such right or remedy and shall not be construed as a bar to or a waiver of any such right or remedy on any future occasion.

7. Assignment. The Company may not assign any of its respective rights or delegate any of its respective obligations under this Agreement without the prior written consent of the Seller. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

8. Governing Law. This Agreement shall be governed by the laws of the State of California, excluding its conflict of laws principles. Any action or proceeding relating to this Agreement or its enforcement shall be commenced and heard exclusively in the appropriate court

for Alameda, California, and the parties hereby consent and submit to the sole and exclusive jurisdiction of the state and federal courts of California.

9. Attorneys' Fees. In any action brought by the Seller or the Company to enforce the terms of this Agreement, the Prevailing Party shall be entitled to a reasonable sum of attorneys' fees, costs, and litigation expenses, whether or not such action is prosecuted to judgment. As used herein, "Prevailing Party" shall mean, without limitation, a party who agrees to dismiss an action upon payment by the other party of sums allegedly due or performance of covenants allegedly breached, or who obtains substantially the relief sought by that party.

10. Notices. All notices and other communications provided for under this Agreement shall be in writing and shall be personally delivered or sent by first class United States mail, by nationally recognized overnight courier such as Federal Express or DHL, or by facsimile or by other means of telecommunication, to the following addresses:

If to the Company: Smart Alec's Intelligent Fast Food, Inc.
2355 Telegraph Avenue
Berkeley, CA 94704
Telephone No.: (510) 704-4000
Facsimile No.: (510) 644-2998

and if to the Seller: Yugen Kaisha, Y.F.K
c/o George H. Pretty, II
PARKER, POE, ADAMS, & BERNSTEIN, L.L.P.
401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202
Telephone No.: (704) 372-9000
Facsimile No.: (704) 334-4706

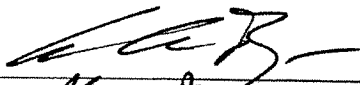
or, as to each party, at such other address as shall be designated by such party in a written notice to the other party complying as to delivery with the terms of this Section. All such notices and communications shall be deemed received (i) if personally delivered, upon delivery; (ii) if sent by first class United States mail, following deposit in the mail with first class postage prepaid, upon receipt; (iii) if sent by courier service with next business day delivery charges prepaid, upon receipt; and (iv) if sent by facsimile or similar form of telecommunications, upon receipt.

11. Counterparts. The Company and the Seller agree that this Agreement may be executed (by original or telecopied signature) in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute but one and the same instrument.

[SIGNATURES APPEAR ON FOLLOWING PAGE]

IN WITNESS WHEREOF, this Agreement has been executed and delivered on the date first set forth above.

SMART ALEC'S INTELLIGENT FOOD, INC.

By: 
Name: Alex Popov
Title: CEO

YUGEN KAISHA, Y.K.F.

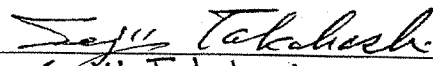
By: 
Name: Seiji Takahashi
Title: President + CEO

EXHIBIT A
TO STOCK REDEMPTION AGREEMENT
SECURED REDEMPTION PROMISSORY NOTE

\$~~772~~,000

February 6, 2004
 San Francisco, CA

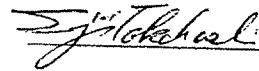
FOR VALUE RECEIVED, Smart Alec's Intelligent Fast Food, Inc., a California corporation (the "**Maker**") hereby promises to pay to Yugen Kaisha, Y.K.F., a company organized under the laws of Japan (the "**Payee**"), the principal sum of Seven Hundred ~~Seventy~~ TWO Thousand Dollars (\$~~772~~,000).

This Secured Redemption Promissory Note (this "**Note**") is issued pursuant to the terms of that certain Settlement Agreement of even date herewith by and among the Maker, the Payee, Alexander Popov, and Stephanie Dodson (the "**Settlement Agreement**") and that certain redemption agreement of even date herewith by and between the Maker and the Payee (the "**Stock Redemption Agreement**"). All capitalized terms not otherwise defined herein shall have the meanings given to those terms in the Settlement Agreement. Payment of the indebtedness evidenced by this Note is secured by the Security Agreement, the Guarantee and the Pledge Agreement.

1. Payments.

- a. The principal amount of this Note shall be due and payable in monthly installments on the fifteenth day of each month, commencing with the first such date following the date of this Note, in accordance with Section 1 of the Stock Redemption Agreement, with all outstanding amounts due hereunder payable no later than December 31, 2008.
- b. The Maker hereby unconditionally promises to pay, without set-off or claim, the amounts due under this Note to the Payee in accordance with the terms of Section 1 of the Stock Redemption Agreement and this Note. Payments shall be made by wire transfer of immediately available funds and must be received on or before the fifteenth of each month as set forth below:

Bank: _____
 Location: _____
 Account No.: _____
 ABA No.: _____
 Attn: _____

 _____

2. Events of Default. The occurrence of any one or more of the following events with respect to the Maker shall constitute an event of default hereunder ("Event of Default"):

- a. If the Maker shall fail to pay when due any payment due under this Note.
- b. If the Maker shall fail to perform any of its covenants or agreements under this note, the Settlement Agreement, the Stock Redemption Agreement or the Security Agreement.
- c. If any representation or warranty made by the Maker in this Note, the Settlement Agreement, the Stock Redemption Agreement, or the Security Agreement shall prove to have been incorrect or inaccurate in any material respect on or as of the date made.
- d. If any amendment to or termination of a financing statement naming the Maker as debtor and the Payee as secured party, or any correction statement respect thereto, is filed in any jurisdiction by any party other than Payee or its counsel without the prior written consent of Payee.
- e. If, pursuant to or within the meaning of the United States Bankruptcy Code or any other federal or state law relating to insolvency or relief of debtors (a "**Bankruptcy Law**"), the Maker shall (i) commence a voluntary case or proceeding; (ii) consent to the entry of an order for relief against it in an involuntary case; (iii) consent to the appointment of a trustee, receiver, assignee, liquidator or similar official; (iv) make an assignment for the benefit of its creditors; or (v) admit in writing its inability to pay its debts as they become due.
- f. If a court of competent jurisdiction enters an order or decree under any Bankruptcy Law that (i) is for relief against the Maker in an involuntary case, (ii) appoints a trustee, receiver, assignee, liquidator or similar official for the Maker or substantially all of the Maker's properties, or (iii) orders the liquidation of the Maker, and in each case the order or decree is not dismissed within 120 days.

The Maker shall notify the Payee in writing within five (5) business days after the occurrence of any Event of Default of which the Maker acquires knowledge.

3. Remedies. Upon the occurrence of an Event of Default hereunder (unless all Events of Default have been cured or waived by the Payee), the Payee may, at its option, (i) by written notice to the Maker, declare the entire unpaid balance of this Note immediately due and payable regardless of any prior forbearance and without presentment, demand, protest, or further notice of any kind, all of which are hereby waived, and (ii) exercise any and all rights and remedies available to the Payee under applicable law (including the rights of a secured party), including, without limitation, the right to collect from the Maker all sums due under this Note, without presentment, demand, protest, or further notice of any kind, all of which are hereby waived. The Maker shall pay all reasonable costs and expenses incurred by or on behalf of the Payee in connection with the Payee's exercise of any or all of its rights and remedies under this Note, including, without limitation, reasonable attorneys' fees actually incurred by the Payee.

4. Waiver. The Maker and any sureties, endorsers, or guarantors, hereby waive protest, presentment, notice of dishonor, and notice of acceleration of maturity and agree to continue to remain bound for the payment of principal, interest and all other sums due under this Note

notwithstanding any change or changes by way of release, surrender, exchange, modification or substitution of any security for this Note or by way of any extension or extensions of time for the payment of principal; and all such parties waive all and every kind of notice of such change or changes of every kind and, to the full extent permitted by law, the right to plead any statute of limitations to any demand hereunder and agree that the same may be made without notice or consent of any of them.

5. Representations and Warranties. Maker hereby represents and warrants to Payee on the date of issuance of this Note that:

- a. it is a duly formed and validly existing corporation in good standing under the laws of the State of California and has the corporate power and authority to execute and deliver this Note;
- b. this Note constitutes the duly authorized, legally valid and binding obligation of Maker, enforceable against Maker in accordance with its terms, except as may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws relating to or limiting creditors' rights generally or by equitable principles relating to enforceability; and
- c. the execution, delivery and performance by Maker of this Note do not and will not violate any law, governmental rule or regulation, court order or agreement to which it is subject or the articles of incorporation or bylaws of the Maker.

6. Miscellaneous.

- a. Amendment; No Waiver. This Note may not be amended except in a writing executed by both parties. No waiver of the rights of the Payee hereunder shall be effective unless in writing and executed by an authorized officer of the Payee, and any waiver so granted by the Payee shall be limited to that particular matter and shall not constitute a waiver of any other or similar matter. No failure or delay on the part of Payee or any other holder of this Note to exercise any right, power or privilege under this Note and no course of dealing between Maker and Payee shall impair such right, power or privilege or operate as a waiver of any default or any acquiescence therein.
- b. Assignment. This Note shall inure to the benefit of the Payee and its successors and assigns. All of the covenants and agreements contained herein are the promises of the Maker and shall bind the Maker and its respective successors, heirs and assigns; provided, however, that the Maker may not assign any of its respective rights or delegate any of its respective obligations under this Note without the prior written consent of the Payee and Payee, at its sole discretion, may require that Maker remain liable for all covenants and obligations set forth herein as a condition to granting such consent.
- c. Severability. If any provision of this Note shall be invalid, illegal or unenforceable, then the validity, legality and enforceability of the remaining provisions shall not be affected thereby.

- d. **Governing Law; Jurisdiction.** This Note shall be governed by and construed in accordance with the laws of the State of California, excluding its conflicts of law principles. Any action or proceeding relating to this Note or its enforcement shall be commenced and heard exclusively in the appropriate court for Alameda, California, and the parties hereby consent and submit to the sole and exclusive jurisdiction of the state and federal courts of California.
- e. **Attorneys' Fees.** In the event that suit be brought hereon, or an attorney be employed or expenses be incurred to compel payment of this Note or any portion of the indebtedness evidenced hereby or enforce its provisions, Maker promises to pay all such expenses and attorneys' fees, including but not limited to all expenses incurred in any bankruptcy proceeding.
- f. **Mutilated or Lost Note.** If this Note shall become mutilated, destroyed, lost or stolen, upon the written request of Payee, Maker shall issue and deliver to Payee, in replacement thereof, a new Note, in the same face amount and dated the same date as this Note so mutilated, destroyed, lost or stolen. If this Note has become mutilated, such Note shall be surrendered to Maker for cancellation. If this Note has been destroyed, lost, or stolen, Payee shall furnish to Maker such security or indemnity as may be required by it to hold the Maker harmless for the issuance of a new Note. Payee shall also advise as to the principal which has been paid and the date to which interest has been paid on this Note. Maker shall make a notation on each new Note of the amount of all payments of principal previously made on the mutilated, destroyed, lost or stolen Note with respect to which such new Note is issued and the date to which interest on such old Note has been paid. Maker shall then distribute the new Note to Payee and, in the case of a mutilated Note, cancel the original, mutilated Note.
- g. **Notices.** All notices and other communications provided for under this Note shall be in writing and shall be personally delivered or sent by first class United States mail, by nationally recognized overnight courier such as Federal Express or DHL, or by facsimile or by other means of telecommunication, to the following addresses:

If to Maker: Smart Alec's Intelligent Fast Food, Inc.
 2355 Telegraph Avenue
 Berkeley, CA 94704
 Telephone No.: (510) 704-4000
 Facsimile No.: (510) 644-2998

and if to Payee: Yugen Kaisha, Y.F.K
 c/o George H. Pretty, II
 PARKER, POE, ADAMS, & BERNSTEIN, L.L.P.
 401 South Tryon Street, Suite 3000
 Charlotte, North Carolina 28202
 Telephone No.: (704) 372-9000


Facsimile No.: (704) 334-4706

or, as to each party, at such other address as shall be designated by such party in a written notice to the other party complying as to delivery with the terms of this Section. All such notices and communications shall be deemed received (i) if personally delivered, upon delivery; (ii) if sent by first class United States mail, following deposit in the mail with first class postage prepaid, upon receipt; (iii) if sent by courier service with next business day delivery charges prepaid, upon receipt; and (iv) if sent by facsimile or similar form of telecommunications, upon receipt.

[Signature Page Follows]

IN WITNESS WHEREOF, the Maker has executed or caused this instrument to be executed as of the day and year first written above.

Smart Alec's Intelligent Food, Inc.

By: 

Name: Alex Popov

Title: CEO

S417256.4

EXHIBIT 2

Closing Agreement re Payoff of Secured Redemption Promissory Note

This Closing Agreement ("Agreement") is executed this 12th day of March, 2007 by Yugen Kaisha, Y.K.F., a Japanese corporation ("YKF") and Stephanie Dodson ("Dodson") for the purpose of evidencing the agreement of the parties with respect to the delivery and receipt of certain funds and documents by and between the parties as set forth herein.

I. Introduction.

YKF holds security interests in certain tangible and intangible assets of Smart Alec's Intelligent Food, Inc., a California corporation ("Smart Alec's"), including, without limitation, deposit accounts, intellectual property, Smart Alec's leasehold interest in the property located at 2355 Telegraph Avenue, Berkeley, CA, inventory, equipment, fixtures, accounts and general intangibles, and in certain shares of common stock of Smart Alec's (referred to collectively as the "Security Interests"), pursuant to the following documents: (a) that certain Settlement Agreement and Release by and among YKF, Smart Alec's, Alexander Popov ("Popov") and Dodson dated as February 6, 2004 (the "Settlement Agreement"); (b) that certain Stock Redemption Agreement by and between Smart Alec's and YKF dated as of February 6, 2004 (the "Stock Redemption Agreement"); (c) that certain Secured Redemption Promissory Note of Smart Alec's to YKF dated as of February 6, 2004 (the "Note"); (d) that certain Security Agreement by and between Smart Alec's and YKF dated as of February 6, 2004 (the "Security Agreement"); (e) that certain Leasehold Deed of Trust, Security Agreement and Fixture Filing with Assignment of Rents and Leases executed by Smart Alec's dated June 28, 2006 (the "Deed of Trust"); and (f) that certain Stock Pledge Agreement by and between Popov and YKF dated as of February 6, 2004 (the "Pledge Agreement"). The Settlement Agreement, Stock Redemption Agreement, Note, Security Agreement, Deed of Trust, and Pledge Agreement are referred to collectively herein as the "Settlement Documents").

Dodson has informed YKF that she intends to payoff the balance of Smart Alec's obligations to YKF under the Stock Redemption Agreement and Note in exchange for YKF's release of all of the Security Interests and on condition that she receive the documents listed in Part III hereof, and YKF is willing to do so in the manner set forth in Part III on the condition that it receive the funds listed in Part II hereof. Delivery of the funds and documents referred to herein will occur on the "Closing Date," which shall be on March 12, 2007 or such later date as may be approved by YKF and Dodson.

II. Funds to be received by YKF at Closing.

YKF shall receive on the Closing Date:

- A. Cash, in immediately available funds, in the amount of \$535,458.99 (the "Closing Payment"), consisting of:
 - (i) \$519,615.21, being the principal balance of the Note;
 - (ii) \$1,817.36, being accrued and unpaid interest on the principal amount of the Note to and including March 12, 2007;
 - (iii) \$10,022.89, being unpaid fees and expenses of YKF's counsel; and

- (iv) \$4,003.53, being reimbursement from the Smart Alec's Transfer Account of expenses incurred by Brian Baymiller as an officer of Smart Alec's.
- B. The Closing Payment shall be paid as follows:
 - (i) A cashier's check in the amount of \$50,016.81, being funds withdrawn from the Smart Alec's Transfer Account on March 9, 2007, payable to the Nixon Peabody Trust Account; and
 - (ii) A cashier's check in the amount of \$485,442.18, being funds of Dodson, payable to the Nixon Peabody Trust Account.
- C. The Closing Payment is in addition to the payment in the amount of \$72,228.59 received by YFK from the Smart Alec's Transfer Account on or about February 26, 2007 (the "Pre-Closing Payment") and applied to the following:
 - (i) \$37,933 for attorneys' fees incurred by YFK in connection with the Note and Redemption Agreement through February 15, 2007;
 - (ii) Accrued interest on the principal balance of the Note (\$525,000) from July 17, 2006 to December 20, 2006 in the amount of \$22,438 and from January 13, 2007 to February 26, 2007 in the amount of \$6,472.80, total of \$28,910.80; and
 - (iii) \$5,384.79 as a partial payment on account of the principal balance of the Note.

III. Documents to be delivered by YFK at Closing.

Upon receipt by YFK of the Closing Payment, YKF will deliver the following to Dodson, receipt of which is hereby acknowledged:

- A. The original Deed of Trust which was not recorded;
- B. The original Note, marked "Paid in Full;"
- C. An original Notice of Rescission rescinding the Notice of Default and Election to Sell Under Deed of Trust which was recorded in the Office of the County Recorder of Alameda County, California on October 3, 2006 as Instrument No. 2006373587;
- D. An original Notice of Rescission rescinding the Notice of Trustee's Sale which was recorded in the Office of the County Recorder of Alameda County, California on February 21, 2007 as Instrument No. 2007078887;
- E. A copy of the full Reconveyance of the Deed of Trust executed by YKF (without notary acknowledgement), dated as of March 12, 2007, the original of which will be provided to Dodson's counsel upon receipt from Japan;
- F. An original UCC Financing Statement Amendment form, terminating the UCC-1 Financing Statement filed by YKF with the California Secretary of State on April 1, 2004, as Filing No. 0409960088;
- G. Formal resignations of the existing officers and directors of Smart Alec's, Brian Baymiller and Yasuo Ezaki;

- H. The Original Stock Certificate of YFK dated May 26, 2006, certificate number 5, representing the total shares of Smart Alec's held by YFK (975,484) after the redemption in May 2006, together with an original Stock Power signed by YFK;
- I. The original Stock Certificate #1 dated January 10, 1997, issued to Popov for 3,744,000 shares of Smart Alec's.
- J. The original Consolidated Promissory note in the amount of \$85,000, dated as of February 6, 2004, executed by Popov to Smart Alec's;

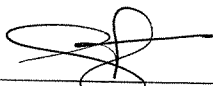
IV. Other Matters.

- A. Merger. This Agreement constitutes the complete and final agreement between the parties regarding the matters that are addressed herein and supersedes all prior or contemporaneous negotiations, covenants, agreements, understandings, representations, or warranties of any nature whatsoever with respect thereto, all of which have become merged and finally integrated into this Agreement.
- B. Amendments. No amendment, modification, termination, or waiver of any provision of this Agreement shall in any event be effective unless the same shall be in writing and signed by all parties hereto.
- C. Governing Law. This Agreement shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the State of California applicable to agreements made and to be performed wholly within the State of California.
- D. Further Acts and Assurances. Each party hereto shall do such further acts, shall perform such further action, and shall execute and deliver such additional agreements and instruments as the other may reasonably require to consummate, evidence or confirm the agreements and understandings contained herein in the manner contemplated hereby.

YUGEN KAISHA, Y.K.F.

By: 

James S. Monroe, its attorney


Stephanie Dodson

James S. Monroe, Esq. (State Bar Number: 102328)
Gregory E. Schopf (State Bar Number: 122862)
NIXON PEABODY LLP
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Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER N. POPOV,

Debtor.

Case No. 05-32929-TC

Chapter 7

YUGEN KAISHA, Y.K.F.,

Plaintiff,

v.

STEPHANIE DODSON,

Defendant.

Adv. Pro. No.: 07-3104-TC

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

CASE NAME: IN RE ALEXANDER N., POPOV, Debtor;
ADV. PROCEEDING: YUGEN KAISHA, Y.K.F. v. STEPHANIE DODSON
COURT: U.S. Bankruptcy Court, Northern District of California
 (San Francisco)
CASE NO.: 05-32929-TC; Adv. Proc. No.: 07-3104-TC
FILE: 031405.000006

I, the undersigned, certify that I am employed in the City and County of San Francisco, California; that I am over the age of eighteen years and not a party to the within action; and that my business address is One Embarcadero Center, Suite 1800, San Francisco, CA 94111-3996. On this date, I served the following document(s):

- (1) **Notice of Hearing on Motion of Yugen Kaisha, Y.K.F. to Dismiss Counterclaim for Lack of Subject Matter Jurisdiction;**
- (2) **Motion of Yugen Kaisha, Y.K.F. to Dismiss Counterclaim for Lack of Subject Matter Jurisdiction;**
- (3) **Declaration of James S. Monroe in Support of Motion of Yugen Kaisha, Y.K.F. to Dismiss Counterclaim for Lack of Subject Matter Jurisdiction;**
- (4) **Certificate of Service.**

on the party stated below, placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

 X : By First-Class Mail — I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

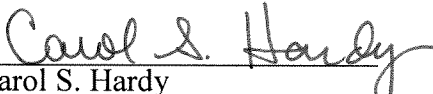
 : By Certified Mail Service — I am readily familiar with the firm's practice for collection and processing of correspondence for Certified Mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with Certified Mail postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

Addressee

Joel K. Belway
 (State Bar Number 60556)
 THE LAW OFFICE OF JOEL K. BELWAY
 Professional Corporation
 235 Montgomery Street, Suite 668
 San Francisco, California 94104

United States Trustee
 San Francisco Division
 235 Pine Street, Suite 700
 San Francisco, CA 94104

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 14, 2007, at San Francisco, California.


 Carol S. Hardy

1 MARK D. BYRNE, S/B #109268
2 LAW OFFICES OF TRIANO & BYRNE
3 25 Jessie Street, 16th Floor
4 San Francisco, CA 94105
5 (415) 371-8000
6 (415) 371-8001 fax
7 Attorneys for Martin F. Triano

8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 In re:

12)
13 ALEXANDER N. POPOV,)

14 Debtor.)

15)
16 YUGEN KAISHA, Y.K.F.,)

17 Plaintiff,)

18 v.)

19 STEPHANIE DODSON)

20 Defendants.)

Case No. 05-32929

Chapter 7

Adv. Pro. No.: 07-03104

**MOTION FOR INTERVENTION
BY MARTIN F. TRIANO
DBA LAW OFFICES OF
MARTIN F. TRIANO**

DATE: DECEMBER 14, 2007
TIME: 9:30 A.M.
ROOM.: 23

23 By this Motion for Intervention Martin F. Triano, dba Law Offices of Martin F. Triano
24 seeks to file a complaint to intervene in the adversary proceeding and for declaratory relief
25 regarding his rights and remedies in this adversary proceeding, based upon his secured interest in
26 the shares that are the subject of this adversary proceeding as evidenced by his Proof of Claim in
27 this bankruptcy action.
28

Law Offices
TRIANO & BYRNE
25 Jessie Street 16th Floor
San Francisco, CA 94105
Tel. 415-371-8000
Fax 415-371-8001

MOTION FOR INTERVENTION

1 Martin F. Triano, dba Law Offices of Martin F. Triano seeks to protect its claim secured
2 by the same shares of stock which are the subject of this adversary proceeding. He should be
3 allowed to intervene in the present action to avoid the necessity of litigating his claims in an
4 alternative forum, which could result in inconsistent rulings and which would not efficiently use
5 judicial resources. Therefore, this court should grant the application for intervention in the
6 present action.

7 This motion for intervention in this adversary proceeding is based upon the Points and
8 Authorities of the Declaration of Mark D. Byrne, the Complaint submitted herewith, the
9 Memorandum of Points and Authorities served and filed herewith, together with such papers and
10 records, and other evidence as may presented at the Hearing on this matter.

11 Dated:

11/15/07

LAW OFFICES OF TRIANO & BYRNE

12
13 By:


MARK D. BYRNE

Attorney for Martin F. Triano
dba Law Office of Martin F. Triano

1 MARK D. BYRNE, S/B #109268
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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

| | | |
|--------------------------|---|--------------------------------|
| 11 In re: |) | |
| 12 |) | Case No. 05-32929 |
| 13 ALEXANDER N. POPOV, |) | |
| 14 Debtor. |) | Chapter 7 |
| 15 |) | Adv. Pro. No.: 07-03104 |
| 16 YUGEN KAISHA, Y.K.F., |) | |
| 17 Plaintiff, |) | NOTICE OF HEARING ON |
| 18 v. |) | MOTION FOR INTERVENTION |
| 19 STEPHANIE DODSON |) | BY MARTIN F. TRIANO |
| 20 |) | DBA LAW OFFICES OF |
| 21 Defendants. |) | MARTIN F. TRIANO |
| 22 |) | DATE: DECEMBER 14, 2007 |
| |) | TIME: 9:30 A.M. |
| |) | ROOM.: 23 |

23 NOTICE IS HEREBY GIVEN TO James Monroe, Esq. of Nixon Peabody LLP, counsel
24 for Yugen Kaisha (YKF), Joel Belway, counsel for Stephanie Dodson that the Law Offices of
25 Triano & Byrne, on behalf of Martin F. Triano dba Law Offices of Martin F. Triano will bring a
26 motion for intervention in the instant adversary proceeding by Yugen Kaisha (YKF) at the
27 Hearing on December 14, 2007 at 9:30 a.m. at the U.S. Bankruptcy Court, Northern District of
28 California, San Francisco Division, in Room 23.

Law Offices
TRIANO & BYRNE
25 Jessie Street 16th Floor
San Francisco, CA 94105
Tel. 415-371-8000
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NOTICE OF MOTION FOR INTERVENTION

1

1 By this Motion for Intervention Martin F. Triano, dba Law Offices of Martin F. Triano
2 seeks to file a complaint to intervene in the adversary proceeding and for declaratory relief
3 regarding his rights and remedies in this adversary proceeding, based upon his secured interest in
4 the shares that are the subject of this adversary proceeding as evidenced by his Proof of Claim in
5 this bankruptcy action.

6
7 Dated:

11/15/07

LAW OFFICES OF TRIANO & BYRNE

8
9 By:


MARK D. BYRNE

Attorney for Martin F. Triano
dba Law Office of Martin F. Triano

1 MARK D. BYRNE, S/B #109268
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3 25 Jessie Street, 16th Floor
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5 (415) 371-8000
6 (415) 371-8001 fax
7 Attorneys for Martin F. Triano
8

9 **UNITED STATES BANKRUPTCY COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 In re:)

13 ALEXANDER N. POPOV,)

14 Debtor.)

15 _____)
16 YUGEN KAISHA, Y.K.F.,)

17 Plaintiff,)

18 v.)

19 STEPHANIE DODSON)

20 Defendant.)
21)
22)
23)
24)
25)
26)
27)
28)

Case No. 05-32929

Chapter 7

Adv. Pro. No.: 07-03104

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR INTERVENTION
BY MARTIN F. TRIANO DBA LAW
OFFICES OF MARTIN F. TRIANO**

DATE: DECEMBER 14, 2007

TIME: 9:30 A.M.

ROOM.: 23

Law Offices
TRIANO & BYRNE
25 Jessie Street 16th Floor
San Francisco, CA 94105
Tel. 415-371-8000
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TABLE OF CONTENTS

| | | |
|----|--|----|
| 1 | | |
| 2 | TABLE OF CONTENTS | ii |
| 3 | TABLE OF AUTHORITIES | iv |
| 4 | I. INTRODUCTION | 1 |
| 5 | II. STATEMENT OF FACTS..... | 1 |
| 6 | III. ARGUMENT | 3 |
| 7 | A. MFT Is Entitled to Intervention of Right in this Action and Permissive Intervention, | |
| 8 | Because He Holds a Secured Interest In the Shares that Are the Subject of this Action and a | |
| 9 | Valid Proof of Claim Based on that Security..... | 3 |
| 10 | B. MFT Is Entitled to Intervention of Right in this Action, because He Has an Interest Relating | |
| 11 | to the Property or Transaction that Is the Subject of this Action and Disposition of this Action | |
| 12 | Will Impair His Interest If He Is Not Allowed to Intervene..... | 4 |
| 13 | 1. This intervention is timely because it is filed at the incipient stages of this action; therefore | |
| 14 | intervention of right is warranted..... | 4 |
| 15 | 2. MFT has a significantly protectable interest that is related to this action, because he has a | |
| 16 | valid Proof of Claim as a secured creditor of Debtor's estate and he has a perfected interest in | |
| 17 | the Shares that are the subject of this action; therefore intervention of right is warranted..... | 5 |
| 18 | 3. Disposition of this action will impair and impede MFT's ability to collect upon interest in | |
| 19 | the shares and their proceeds if he is not allowed to participate in the remedial scheme in this | |
| 20 | case and forced to litigate is claim in another forum; therefore intervention of right is | |
| 21 | warranted..... | 6 |
| 22 | a. MFT's clear interest in the remedial scheme in this action, because he has a valid Proof | |
| 23 | of Claim for his secured interest in the shares that are the subject of this action; therefore | |
| 24 | intervention of right is warranted..... | 6 |
| 25 | b. A decision in this case could impair and impede in a practical manner MFT's ability to | |
| 26 | pursue his claim in state courts, because of the jurisprudential weight of federal rulings in | |
| 27 | state court; therefore intervention of right is warranted..... | 8 |
| 28 | | |

| | | |
|----|--|----|
| 1 | 4. The current parties do not adequately represent MFT's interest in this action, because they | |
| 2 | are pursuing only their own personal interests; therefore intervention of right is warranted. .. | 9 |
| 3 | C. MFT Is Entitled to Permissive Intervention, Because He Has Filed a Timely Motion that | |
| 4 | Sets Forth His Interest in the Shares that are the Subject of this Action and is Based Upon | |
| 5 | Independent Grounds for Jurisdiction, and Because Equity and Judicial Economy Weigh in | |
| 6 | Favor of Allowing the Action. | 10 |
| 7 | 1. Equity and judicial economy weigh in favor of allowing MFT's intervention, because | |
| 8 | without intervention MFT would be forced to present the a record that would consist of facts | |
| 9 | and arguments that are already before this court; therefore permissive intervention warranted. | |
| 10 | | 10 |
| 11 | 2. MFT timely files this motion to intervene based upon his secured interest in the shares that | |
| 12 | are the subject of this action which is validated by MFT's Proof of Claim previously upheld | |
| 13 | by this court; therefore permissive intervention warranted..... | 11 |
| 14 | IV. CONCLUSION..... | 12 |

TABLE OF AUTHORITIES

Cases

| | |
|---|-----------|
| <i>Donaldson v. U.S.</i> , 400 U.S. 517 (1971)..... | 5 |
| <i>Sagebrush Rebellion, Inc. v. Watt</i> , 713 F.2d 525, 527 (1983)..... | passim |
| <i>See In re Bernal</i> , 223 B.R. 542 (9th Cir. B.A.P., 1998)..... | 4 |
| <i>Sierra Club v. U.S. Environmental Protection Agency</i> , 995 F. 2d 1478 (1993)..... | 4, 5, 11 |
| <i>Stockton v. U.S.</i> , 493 F.2d 1021 (9th Cir. 1971)..... | 9 |
| <i>Trbovich v. United Mine Workers of America</i> , 404 U.S. 528 (1972) | 8 |
| <i>U. S., ex. rel. v. McGough</i> , 967 F.2d 1391 (1992)..... | 4 |
| <i>U.S. v. Stringfellow</i> , 783 F.2d 821 (1986) vacated on other grounds, 480 U.S. 370 (1987) | 6, 7 |
| <i>Venegas v. Skaggs</i> , 867 F.2d 527 (9th Cir. 1989)..... | 9, 10, 11 |
| <i>Wood v. Motorola, Inc.</i> , 587 F. Supp. 531 (D.Haw. 1984.)..... | 10 |
| <i>Yniguez v. State of Arizona</i> , 939 F.2d 727 (9th Cir. 1991) | 6, 7, 8 |

Statutes

| | |
|--|--------|
| Federal Rules of Bankruptcy Procedure, Rule 7024 | 3 |
| Federal Rules of Civil Procedure, Rule 24 | passim |

I. INTRODUCTION

By this Motion for Intervention Martin F. Triano, dba Law Offices of Martin F. Triano seeks to protect its claim secured by the same shares of stock which are the subject of this adversary proceeding. Martin F. Triano should be allowed to intervene in the present action to avoid the necessity of litigating his claims in an alternative forum, which could result in inconsistent rulings and which would not efficiently use judicial resources. Therefore, this court should grant the application for intervention in the present action.

II. STATEMENT OF FACTS

In this application for intervention ("Application") and its accompanying complaint, Martin F. Triano dba Law Offices of Martin F. Triano ("MFT") seeks relief from this court relating to the adversary proceeding commenced by Yugen Kaisha, Y.K.F. ("YKF") on September 5, 2007 ("Adversary Proceeding"). *See* Declaration of Mark D. Byrne in Support of Motion for Intervention ("Byrne Declaration"), ¶ 2, Exhibit A. Like YKF's complaint in the Adversary Proceeding, MFT's application for intervention is based upon the ownership of 3,744,000 shares ("Shares") of Smart Alec's Intelligent Foods, Inc. ("Smart Alec's") by Alexander Popov ("Debtor"), which were transferred to Stephanie Dodson ("Defendant" or "Dodson") for the sum of \$12,500, pursuant to the Share Purchase Agreement dated April 18, 2004 ("Transfer"). *See* Byrne Declaration, ¶ 3, Exhibit B.

Debtor filed bankruptcy on September 6, 2005 ("Bankruptcy Action") and was subsequently discharged on April 9, 2006. *See* Byrne Declaration, ¶¶ 4-5, Exhibits C, D. MFT timely presented a proof of claim secured by the Shares for payment of attorney's fees ("Proof of Claim"), which was not objected to by any creditors. *See* Byrne Declaration, ¶¶ 6-7, 9, Exhibit E. However, upon objection by the Trustee of the Debtor's estate, E. Lynn Schoenmann ("Trustee"), to a portion of the claim, but not that portion related to the secured interest in the Shares, the Proof of Claim was upheld by this bankruptcy court and the federal district court upon appeal. *See* Byrne Declaration, ¶¶ 8, 10-11, Exhibits F, G. On or about August 1, 2007, YKF purchased from the Trustee the right to bring this Adversary Proceeding against Defendant on behalf of the Debtor's estate. *See* Byrne Declaration, ¶¶ 12, Exhibit H. But, that right was taken subject to MFT's interest

1 as a secured creditor, which limitation was acknowledged by YKF and the Trustee prior to the
2 completion of the sale. *See* Byrne Declaration, ¶¶ 13-21, Exhibits I-L.

3 On April 17, 2002, while Debtor owned the Shares and was President of Smart Alec's, he
4 executed a promissory note for payment he owed to MFT for legal services, in an amount of
5 \$45,648 along with "such additional sums which may accrue from the legal services being
6 provided" by MFT ("Note"). *See* Byrne Declaration, ¶¶ 22, 25, Exhibit M. At the same time,
7 Debtor also pledged the Shares as collateral to secure payment of the Note, and executed a
8 guarantee by Smart Alec's for performance by Debtor under the Note. *See* Byrne Declaration,
9 ¶¶ 23, 25, Exhibit M. The Note also provided for the collection of attorneys fees and costs incurred
10 in the enforcement of its terms. *See* Byrne Declaration, ¶¶ 24, 25, Exhibit M. MFT subsequently
11 perfected his interest in the Shares by filing a UCC-1 filing statement with the California Secretary
12 of State on May 10, 2002, which filing was amended on April 20, 2007 to reflect MFT's continuing
13 interest in the shares subsequent to the Debtor's discharge in the Bankruptcy Action. *See* Byrne
14 Declaration, ¶¶ 26-27, Exhibit N. MFT also mailed a copy of the Note to Defendant on January 27,
15 2003, more than one year prior to the date of the Share Purchase Agreement, to provide her with
16 notice of MFT's secured interest. *See* Byrne Declaration, ¶¶ 28-29, Exhibit O.

17 In order to collect upon the guarantor of the Note, MFT filed an action in state court against
18 Smart Alec's and Dodson on July 17, 2007 ("State Action"). *See* Byrne Declaration, ¶¶ 30-31,
19 Exhibit P. Additionally, MFT alleges that Defendant purchased and subsequently encumbered the
20 Shares without notice to MFT in violation of the Note, due to her belief that the Note is not valid
21 and enforceable. *See* Byrne Declaration, ¶¶ 30-31, Exhibit P. The State Action therefore requests a
22 judicial determination that the Note gives MFT a valid, enforceable security interest in the Shares
23 and that Dodson shall not further encumber MFT's secured interest in the Shares. *See* Byrne
24 Declaration, ¶¶ 30-31, Exhibit P. MFT also prays for damages against Defendant for Intentional
25 Interference with Contractual Relations. *See* Byrne Declaration, ¶¶ 30-31, Exhibit P.

26 YKF brought its Adversary Proceeding on or about September 5, 2007. *See* Byrne
27 Declaration, ¶ 2, Exhibit A. In its complaint, YKF contends that (1) the Transfer actually took place
28 in the month prior to the Bankruptcy Action filing, that (2) Defendant did not receive the Transfer

1 in good faith and that (3) she did not pay a reasonably equivalent value for the Shares. *See* Exhibit
 2 A attached hereto. Thus, YKF argues that the Transfer is subject to set aside and the Shares are
 3 property of the Debtor's estate. *See* Byrne Declaration, ¶ 2, Exhibit A. Accordingly, YKF seeks
 4 relief preventing Defendant from transferring the Shares prior to judgment in this Adversary
 5 Proceeding, seeks to set aside the Transfer and to recover the Shares on behalf of the bankruptcy
 6 estate for its own benefit. *See* Byrne Declaration, ¶ 2, Exhibit A.

7 The complaint submitted by MFT along with this Application requests relief related to
 8 YKF's Adversary Proceeding complaint and similar to the relief requested in MFT's State
 9 Action. *See* Byrne Declaration, ¶ 32, Exhibit Q. Namely, MFT seeks declaratory relief from the
 10 court to enforce and collect upon his secured interest in the Shares, in light of the Note he holds,
 11 his filed UCC statement, the Transfer of the Shares without notice to MFT and Dodson's
 12 knowledge of the Note. Therefore, MFT seeks a confirmation from this court that (a) he holds a
 13 valid proof of claim in the Debtor's estate; (b) he is entitled to recover in this Adversary
 14 Proceeding based upon his proof of claim (c) he possesses a valid security interest on the Shares
 15 of stock formerly held by Debtor and now held by Defendant; (d) he possesses a valid security
 16 interest in the proceeds from the Shares formerly held by Debtor and now held by Defendant; (e)
 17 any amounts recovered by YKF in this action are proceeds of the Shares and should be paid
 18 directly to him pursuant to his secured interest in the Shares; and (e) attorneys fees and costs
 19 incurred herein are collectable under the Note. *See* Byrne Declaration, ¶ 32, Exhibit Q.

20 III. ARGUMENT

21 **A. MFT Is Entitled to Intervention of Right in this Action and Permissive**
 22 **Intervention, Because He Holds a Secured Interest In the Shares that Are the Subject of this**
 23 **Action and a Valid Proof of Claim Based on that Security.**

24 MFT is entitled to intervene in the present action pursuant to Rule 7024 of the Federal
 25 Rules of Bankruptcy Procedure, which states that intervention in an adversary proceeding is
 26 governed by the Federal Rules of Civil Procedure, Rule 24 ("Rule 24"). Rule 24 allows for
 27 intervention of right and permissive intervention and "traditionally has received a liberal
 28

1 construction in favor of applicants for intervention.” *See Sagebrush Rebellion, Inc. v. Watt*, 713
2 F.2d 525, 527 (1983).

3 MFT holds a valid proof of claim as a secured creditor of Debtor, and he holds a secured
4 interest in the Shares and the proceeds realized therefrom, which are the subject of the Adversary
5 Proceeding. The Transfer of those Shares, as alleged by YKF, has affected MFT’s secured interest
6 pursuant to the Note he holds. Accordingly, any determination in the Adversary Proceeding will
7 impair and impede MFT’s ability to collect upon his valid proof of claim and protect his secured
8 interest in the Shares. MFT is, therefore, entitled to intervene and participate in the present action
9 and its remedy, as discussed below.

10 **B. MFT Is Entitled to Intervention of Right in this Action, because He Has an Interest**
11 **Relating to the Property or Transaction that Is the Subject of this Action and Disposition of**
12 **this Action Will Impair His Interest If He Is Not Allowed to Intervene.**

13 The Ninth Circuit has set forth a 4 part test for Intervention of Right pursuant to Rule
14 24(a)(2)¹: “(1) the applicant’s motion must be timely; (2) the applicant must assert an interest
15 relating to the property or transaction which is the subject of the action; (3) the applicant must be so
16 situated that without intervention the disposition of the action may, as a practical matter, impair or
17 impede his ability to protect that interest; and (4) the applicant’s interest must be inadequately
18 represented by the other parties.” *See In re Bernal*, 223 B.R. 542, 547 (9th Cir. B.A.P., 1998), *citing*
19 *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983). As discussed below, MFT
20 clearly meets each prong of this test, and as such, he is entitled to intervene in the present action.

21 **1. This intervention is timely because it is filed at the incipient stages of this**
22 **action; therefore intervention of right is warranted.**

23 Where the “application for intervention was made at the outset of the litigation,” it is
24 accepted as timely submitted. *Sierra Club v. U.S. Environmental Protection Agency*, 995 F. 2d
25 1478, 1481 (1993) (application for intervention made “before the EPA had even filed its answer”
26

27 ¹ Rule 24(a)(2) provides that “the court must permit anyone to intervene who . . . (2) claims
28 an interest relating to the property or transaction that is the subject of the action, and is so

1 was timely.); *see also U. S., ex. rel. v. McGough*, 967 F.2d 1391, 1394 (1992) (three part test for
 2 timeliness, includes “(1) the stage of the proceeding at which the applicant seeks to intervene; (2)
 3 the prejudice to the other parties; and (3) the reason for and length of the delay.”). Here, MFT is
 4 presenting his application for intervention contemporaneously with Defendant’s answer. As such,
 5 he clearly did not delay in his application, and thus there is no resulting prejudice to other parties.
 6 Therefore, MFT’s Application is timely, and he meets the first test for Intervention of Right.

7 **2. MFT has a significantly protectable interest that is related to this action,**
 8 **because he has a valid Proof of Claim as a secured creditor of Debtor’s estate and he**
 9 **has a perfected interest in the Shares that are the subject of this action; therefore**
 10 **intervention of right is warranted.**

11 A movant must show that they have a “significantly protectable interest” to justify their
 12 intervention in the matter. *See Donaldson v. U.S.*, 400 U.S. 517, 531 (1971). “It is generally
 13 enough that the interest is protectable under some law, and that there is a relationship between
 14 the legally protectable interest and the claims at issue.” *Sierra Club v. U.S. Environmental*
 15 *Protection Agency*, 995 F. 2d 1478, 1481 (1993) (interpreting *Donaldson*’s “significantly
 16 protectable interest” requirement).

17 MFT can show he has a related interest in two ways. First, MFT holds a Proof of Claim in
 18 this Bankruptcy Action as a secured creditor. YKF seeks to recover such shares or their value in
 19 this Adversary Proceeding on behalf of Debtor’s estate, and he purchased the right to this action
 20 subject to secured creditors’ interests in the estate. Second, MFT he holds a perfected interest in
 21 the Shares that are the subject of Adversary Proceeding and which were transferred by Debtor to
 22 Defendant in violation of the Note, without notice to MFT and without payment of proceeds to
 23 MFT, during the Transfer that is the subject of this action. As a result, MFT’s interest in the
 24 Debtor’s estate and his secured interest in the Shares and any proceeds realized therefrom are
 25 protectable under law. Therefore, MFT has met the second requirement for intervention by

26
 27
 28 situated the disposing of the action may as a practical matter impair or impede the movant’s
 ability to protect its interest, unless existing parties adequately represent their interest.”

1 asserting a "significantly protectable interest" related to this action pursuant to his Proof of Claim
2 and the Note he holds.

3 **3. Disposition of this action will impair and impede MFT's ability to collect**
4 **upon interest in the shares and their proceeds if he is not allowed to participate in the**
5 **remedial scheme in this case and forced to litigate is claim in another forum; therefore**
6 **intervention of right is warranted.**

7 The third test for intervention of right is whether the court's decision in the principle case
8 will result in *practical* impairment of the intervenor's interest. *See Yniguez v. State of Arizona*,
9 939 F.2d 727, 735 (9th Cir. 1991). In the present action, there are two ways in which MFT's
10 interest can be practically impaired. First, MFT could be excluded from the remedial scheme in
11 this action and thus, forced to chase yet another defendant to collect upon the Note he holds.
12 Second, a judgment that is adverse to MFT's interests could be entered by this court, providing
13 persuasive authority against MFT in any related action. The impairment of MFT's interest is not
14 tempered by his ability to raise related claims in state court. *See U.S. v. Stringfellow*, 783 F.2d
15 821, 827 (1986) vacated on other grounds, 480 U.S. 370 (1987). As a result, MFT's ability to
16 protect his interest in the Shares will clearly be impaired by disposition of the present action, and
17 thus, MFT seeks to intervene to fully participate in the record upon which he may have to rely,
18 and to participate in formulation of the applicable remedial scheme in the Adversary Proceeding.
19 *See Sagebrush Rebellion, Inc.*, 713 F.2d at 528; *see also Stringfellow*, 783 F.2d at 827.

20 **a. MFT's clear interest in the remedial scheme in this action, because he**
21 **has a valid Proof of Claim for his secured interest in the shares that are the**
22 **subject of this action; therefore intervention of right is warranted.**

23 In this case, a decision in favor of YKF could will impair MFT's ability to protect his
24 interest in the Shares that are the subject of this Adversary Proceeding. MFT holds a secured
25 interest in the Shares and in any proceeds therefrom, and he holds a valid Proof of Claim as a
26 secured creditor of the Debtor's estate.

27 In this action, YKF seeks relief based upon the fraudulent transfer of the Shares on behalf
28 of the Debtor's estate, including possession of the Shares and payment of the actual value of the

1 Shares at the time of the Transfer. MFT as a secured creditor with a valid Proof of Claim and a
 2 secured interest in the shares, has a significantly protectable interest in the Debtor's estate and in
 3 the Shares, which will be impaired if he is not allowed to participate in any distribution on behalf
 4 of the estate. Not only will MFT be required to chase yet another owner of his collateral, but he
 5 will be denied the benefit of the bankruptcy court forum, which was created for just this purpose:
 6 distribution of a debtor's estate. Therefore, MFT seeks to intervene to participate in the remedy
 7 in this action and the remedy he seeks is different from that sought by YKF, which seeks
 8 personal recovery of all funds that are collected on behalf of the Debtor's estate.

9 The *Stringfellow* court considered that "the disposition of the present litigation will, as a
 10 practical matter, establish the applicable remedial scheme," and that the applicant "has a palpable
 11 interest in that scheme." See *Stringfellow*, 783 F.2d at 827. Finding that the applicant's interests
 12 could be impaired, the court held that:

13 [w]here as here, a prospective intervenor has demonstrated a clear
 14 interest in the remedial scheme, and where the prospective intervenor
 15 seeks to obtain remedies that differ from those sought by the original
 16 plaintiffs, it is reasonable to conclude that disposition of the litigation
 17 may impair the prospective intervenor's ability to protect its interests.

18 See *Stringfellow*, 783 F.2d at 827.

19 Here, MFT seeks to recover pursuant to his valid Proof of Claim as a secured creditor in
 20 this action, and his perfected interest in the Shares and their proceeds. YKF seeks to recover
 21 upon the Shares pursuant to its fraudulent conveyance claim on behalf of the estate, which claim
 22 it purchased subject to the claims of secured creditors and therefore subject to MFT's claim. The
 23 possibility that MFT may collect upon the Note in a subsequent action against YKF for the
 24 Shares or the proceeds from the Shares is outweighed by the sum of the burden of such litigation
 25 and MFT's "palpable interest in the remedial scheme" in the present action. See *Stringfellow*,
 26 783 F.2d at 825. Additionally, the bankruptcy court is the proper forum for this action, which
 27 concerns distribution of the Debtor's estate to creditors. Thus, MFT's intervention is proper.
 28

1 **b. A decision in this case could impair and impede in a practical**
 2 **manner MFT's ability to pursue his claim in state courts, because of the**
 3 **jurisprudential weight of federal rulings in state court; therefore**
 4 **intervention of right is warranted.**

5 In *Yniguez*, the Ninth Circuit held that a decision in a federal action may impair the
 6 applicants' interests in a related state action, regardless of the precedential weight of that
 7 judgment in state court. *See Yniguez*, 939 F.2d at 737. The issue is thus not whether the federal
 8 court decision is binding upon states actions, but whether it will impair the applicants' interest in
 9 that action in a *practical* manner. *See Yniguez*, 939 F.2d at 735. The court held that:

10 jurisprudential concerns might cause other courts to find the
 11 reasoning of the district court more persuasive than they may
 12 otherwise find a similar argument to be and that they might choose
 13 to accept the district court's reasoning to avoid confusion, lack of
 14 finality and disrespect of for law.

15 *See Yniguez*, 939 F.2d at 737. Thus, the *Yniguez* court found that intervention was proper when
 16 an adverse federal court decision "substantially weakened" the applicants' position, and "thereby
 17 impaired the interest" of the applicants. *See Yniguez*, 939 F.2d at 737.

18 Similarly, the principal claim by YKF for fraudulent conveyance is directly related to the
 19 claims raised by MFT in his pending Sate Action against Dodson, namely MFT's claim that
 20 Dodson "Intentionally Interfered with Contractual Relations." Both YKF's claim and MFT's
 21 claim against Dodson concern the circumstances of the Transfer of the Shares. Because the
 22 claims concern the same facts and similar allegations, the persuasive weight of the federal
 23 decision in state court could "cast[] a cloud" over MFT's ability to pursue his related claims
 24 against Dodson in state court, due to and jurisprudential concerns for avoiding inconsistent
 25 rulings. *See Yniguez*, 939 F.2d at 737. Thus, disposition by the bankruptcy court could likely
 26 impair MFT's interest, and as a result, he is entitled to intervene in the present action.
 27
 28

1 **4. The current parties do not adequately represent MFT's interest in this**
 2 **action, because they are pursuing only their own personal interests; therefore**
 3 **intervention of right is warranted.**

4 “The requirement of [Rule 24] is satisfied if the applicant shows that representation of his
 5 interest ‘may be’ inadequate; and the burden of making that showing should be treated as
 6 minimal.” *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972); *see*
 7 *also Sagebrush Rebellion, Inc.*, 713 F.2d at 528. In general, “to determine whether an original
 8 party to a private action will adequately represent the intervenor's interests, a court considers the
 9 following three factors: (1) whether the interests of the present party are such that it will make all
 10 of the arguments the intervenor would make; (2) whether the present party is capable of and
 11 willing to make such arguments; and (3) whether the intervenor would offer a necessary element
 12 to the proceedings that the other parties would neglect.” *See Sagebrush Rebellion, Inc.*, 713
 13 F.2d at 528. Specifically, the Ninth Circuit has held that existing litigants do not adequately
 14 represent the interests of a discharged attorney who seeks to intervene to recover his fee in a
 15 related action. *See Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989); *see also Stockton v.*
 16 *U.S.*, 493 F.2d 1021, 1023 (9th Cir. 1971).

17 MFT's interest in this Adversary Proceeding is based upon collection of his attorney's
 18 fees pursuant to his Proof of Claim as a secured creditor and his perfected interest in the Shares.
 19 Thus, as the Ninth Circuit recognized in *Venegas*, MFT's interest in collecting his attorneys fees
 20 is clearly not represented by the current parties. *See Venegas*, 867 F.2d at 530; *see also Stockton*,
 21 493 F.2d at 1023. YKF purchased the rights to the present action from the Trustee and now
 22 seeks to recover on behalf of the estate for its own personal benefit. Illustratively, YKF's
 23 complaint and specifically its prayer for relief in this action make NO mention of a distribution to
 24 secured creditors, and only request recovery for YKF personally. Likewise, Defendant, who owns
 25 the subject Shares, will not represent MFT's interest in the present action, as her interest directly
 26 conflicts with that of MFT. Therefore, there is no basis to believe that YKF or the Defendant
 27 would make the arguments that MFT would make or that they are willing or even capable of to
 28 make those arguments. *See Sagebrush Rebellion, Inc.*, 713 F.2d at 528. As a result, MFT would

1 clearly offer a necessary element to the proceedings that the current parties would neglect. *See*
 2 *Sagebrush Rebellion, Inc.*, 713 F.2d at 528. Accordingly, MFT has met the “minimal burden”
 3 of demonstrating that his interests are inadequately represented by the present parties, and thus,
 4 intervention is proper.

5 **C. MFT Is Entitled to Permissive Intervention, Because He Has Filed a Timely Motion**
 6 **that Sets Forth His Interest in the Shares that are the Subject of this Action and is Based**
 7 **Upon Independent Grounds for Jurisdiction, and Because Equity and Judicial Economy**
 8 **Weigh in Favor of Allowing the Action.**

9 “Rule 24(b) necessarily vests ‘discretion in the district court to determine the fairest and
 10 most efficient method of handling a case.’ *Venegas*, 867 F.2d at 530. In *Venegas*, a discharged
 11 attorney sought to intervene in order to recover his fees. The court held that it was an abuse of
 12 discretion for the trial court to have not allowed permissive intervention, where judicial
 13 economy, equity and the related interests of claims clearly weighed in favor of such intervention.
 14 *See Venegas*, 867 F.2d at 530.

15 **1. Equity and judicial economy weigh in favor of allowing MFT’s**
 16 **intervention, because without intervention MFT would be forced to present**
 17 **the a record that would consist of facts and arguments that are already**
 18 **before this court; therefore permissive intervention warranted.**

19 The principals relied upon in *Venegas* support MFT’s permissive intervention in this
 20 matter; “[e]quity along with judicial economy dictate that this court employ its ancillary
 21 jurisdiction to hear this motion.” *See Venegas*, 867 F.2d at 531. Similarly to *Venegas*, this court
 22 is “well acquainted with the underlying litigation and the parties” to MFT’s claim, and “no novel
 23 or difficult issues of state law” requiring a state court decision are raised in MFT’s claim. *See*
 24 *Venegas*, 867 F.2d at 531.

25 The *Venegas* court determined that if it mandated litigation of the attorney’s claim in state
 26 court “[t]he parties would be required to make a record that would consist of **facts and**
 27 **arguments that are already before this court,**” and additionally, “the parties would be forced to
 28 litigate before a judge who lacks the **long experience with this case,** and with these parties, that

1 this court has had.” (emphasis added) *See Venegas*, 867 F.2d at 531, (quoting *Wood v. Motorola*,
 2 *Inc.*, 587 F. Supp. 531, 532-33 (D.Haw. 1984.)) Similarly here, this court has already determined
 3 that MFT has a valid Proof of Claim as a secured creditor of Debtor’s Estate, based upon the
 4 Note MFT holds and his perfected interest in the subject Shares. Also, the present action seeks to
 5 establish facts that, as discussed above, directly relate to MFT’s claim for collection upon the
 6 Note of the Shares or the proceeds from the Shares. Finally, YKF’s right to bring this Adversary
 7 Proceeding was taken subject MFT’s interest as a secured creditor of Debtors’ estate. Therefore,
 8 based upon the interests of equity and judicial economy formulated in *Venegas*, MFT should be
 9 permitted to intervene in the present action, pursuant to Rule 24(b)(2).

10 **2. MFT timely files this motion to intervene based upon his secured interest**
 11 **in the shares that are the subject of this action which is validated by MFT’s Proof of**
 12 **Claim previously upheld by this court; therefore permissive intervention warranted.**

13 A court may grant permissive intervention pursuant to Rule 24(b)(2)¹ “if three conditions
 14 are met: (1) the movant must show an independent grounds for jurisdiction; (2) the motion must
 15 be timely; and (3) the movant’s claim or defense and the main action must have a question or law
 16 and fact in common.” *See Venegas*, 867 F.2d at 529. As discussed above, MFT’s claim is based
 17 upon a timely application, his related interest in the Shares as discussed above, and his Proof of
 18 Claim that was upheld in the Bankruptcy Action.

19 MFT has shown that he is presenting his application for intervention contemporaneously
 20 with the answer of Dodson, which clearly is timely, and as such, would not unduly delay or
 21 prejudice the rights of the original parties. *See Sierra Club*, 995 F. 2d at 1481 (1993) (application
 22 for intervention made “before the EPA had even filed its answer” was timely). Also, MFT’s
 23 claim has a question of law or fact in common with the present action, because both claims
 24 concern the ownership of the Shares and their Transfer between Debtor and Defendant.

25
 26
 27 ¹ Rule 24(b)(2) provides that “the court may permit anyone to intervene who: . . . (B) has a claim
 28 *Prejudice*. In exercising its discretion, the court must consider whether the intervention will
 unduly delay or prejudice the adjudication of the original parties’ rights.”

1 MFT's Application is also based upon the Proof of Claim that he submitted during the
 2 Bankruptcy Action from which this Adversary Proceeding stems. The Proof of Claim is based
 3 upon the Note held by MFT and secured by the Shares that are the subject of this Adversary
 4 Proceeding. No creditors objected to MFT's Proof of Claim, and this court and the district court
 5 affirmed MFT's Proof of Claim upon objection and appeal by the Trustee. Additionally, YKF
 6 purchased its right to pursue this fraudulent conveyance claim, subject to the MFT's claim as a
 7 secured creditor of Debtor's estate. Thus, based upon his valid Proof of Claim claim, MFT has
 8 independent grounds for jurisdiction by this court.

9 Accordingly, MFT has provided sufficient evidence to show that he is entitled to
 10 permissive intervention in this matter, pursuant to *Venegas*, 867 F.2d at 529.

11 IV. CONCLUSION

12 MFT has demonstrated that he is entitled to intervene in this Adversary Proceeding under
 13 both theories of Intervention of Right and Permissive Intervention. MFT's application for
 14 intervention is supported by substantial case authority that provides controlling authority in favor
 15 of MFT's intervention. It is therefore clear the MFT has satisfied the requirements for
 16 intervention, especially since Rule 24 has "traditionally has received a liberal construction in
 17 favor of applicants for intervention." *See Sagebrush Rebellion, Inc.*, 713 F.2d at 527.
 18 Accordingly, MFT's application for intervention should be granted.

19
 20 Dated: 11/10/07

LAW OFFICES OF TRIANO & BYRNE

21
 22 By: 
 23 MARK D. BYRNE
 24 Attorney for Martin F. Triano
 25 dba Law Office of Martin F. Triano
 26
 27
 28

1 MARK D. BYRNE, S/B #109268
2 LAW OFFICES OF TRIANO & BYRNE
3 25 Jessie Street, 16th Floor
4 San Francisco, CA 94105
5 (415) 371-8000
6 (415) 371-8001 fax
7 Attorneys for Martin F. Triano

8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 In re:

12)
13 ALEXANDER N. POPOV,)

14 Debtor.)

15)
16 YUGEN KAISHA, Y.K.F.,)

17 Plaintiff,)

18 v.)

19 STEPHANIE DODSON)

20 Defendants.)

Case No. 05-32929

Chapter 7

Adv. Pro. No.: 07-03104

**DECLARATION OF MARK D. BYRNE
IN SUPPORT OF MOTION FOR
INTERVENTION BY MARTIN F.
TRIANO DBA LAW OFFICES OF
MARTIN F. TRIANO**

DATE: DECEMBER 14, 2007

TIME: 9:30 A.M.

ROOM.: 23

21 I, MARK D. BYRNE, declare:
22
23

24 1. I am an attorney duly licensed to practice before all the courts of the State of California,
25 and I am associated with the Law Office of Triano & Byrne, previously known as the Law Offices
26 of Martin F. Triano.
27
28

Law Offices
TRIANO & BYRNE
25 Jessie Street 16th Floor
San Francisco, CA 94105
Tel. 415-371-8000
Fax 415-371-8001

BYRNE DECLARATION IN SUPPORT OF MOTION FOR INTERVENTION

1

1 2. A true and correct copy of the adversary proceeding commenced by Yugen Kaisha,
2 Y.K.F. ("YKF") on September 5, 2007 is attached hereto as Exhibit A.

3 3. A true and correct copy of the Share Purchase Agreement entered into between
4 Stephanie Dodson and Alexander Popov, authenticated to me by Stephanie Dodson during her
5 deposition on February 22, 2007, is attached hereto as Exhibit B.

6 4. A true and correct copy of the petition for bankruptcy by Alexander Popov filed on
7 September 6, 2005 is attached hereto as Exhibit C.

8 5. A true and correct copy of the discharge from bankruptcy for Alexander Popov
9 entered on April 9, 2006 is attached hereto as Exhibit D.

10 6. On or about December 2, 2005, a proof of claim was timely presented for the
11 secured claim of Martin F. Triano dba Law Offices of Martin F. Triano ("MFT") for payment of
12 attorneys fees owed by Mr. Popov for legal services. MFT's proof of claim for payment of attorneys
13 fees is secured by 3,744,000 shares of Smart Alec's Intelligent Foods, Inc. ("Smart Alec's")
14 currently owned by Stephanie Dodson.

15 7. MFT's proof of claim was not objected to by any creditors.

16 8. A portion of MFT's proof of claim, which was not related to MFT's secured interest
17 in the shares of Smart Alec's, was objected to by the Trustee of the Debtor's estate, E. Lynn
18 Schoenmann ("Trustee"). MFT's proof of claim was upheld by the bankruptcy court and by the
19 District Court upon appeal.

20 9. A true and correct copy of the attachment to MFT's proof of claim, which evidences
21 the filing of MFT's proof of claim on December 2, 2005, is attached hereto as Exhibit E.

22 10. A true and correct copy of the Bankruptcy Court ruling upholding MFT's proof of
23 claim is attached hereto as Exhibit F.

24 11. A true and correct copy of the Federal District Court ruling upholding MFT's proof
25 of claim is attached hereto as Exhibit G.

26 12. A true and correct copy of the Agreement entered into between YKF and the
27 Trustee ("Agreement"), whereby YKF purchased from the Trustee the right to bring a fraudulent
28

1 conveyance claim against Stephanie Dodson on behalf of the bankruptcy estate of Alexander Popov
2 and the Order of the Court approving such Agreement are hereto as Exhibit H.

3 13. On or about July 2, 2007, I sent a letter to James Monroe, counsel for YKF, in order
4 to clarify that YKF did not intend that the Agreement for purchase of the fraudulent conveyance
5 claim would allow YKF to recover on behalf of the estate free and clear of MFT's security interest.

6 14. A true and correct copy my correspondence to Mr. Monroe dated July 5, 2007, is
7 attached hereto as Exhibit I.

8 15. On or about July 5, 2007, Mr. Monroe confirmed by facsimile correspondence that
9 the Agreement had no impact on any rights MFT had in the shares that are the subject of the
10 Agreement. Mr. Monroe also confirmed that the Agreement did not allow YKF to recover on behalf
11 of the estate of Mr. Popov free and clear of liens.

12 16. A true and correct copy Mr. Monroe's facsimile correspondence dated July 5, 2007,
13 is attached hereto as Exhibit J.

14 17. On or about July 10, 2007, I sent a letter to Dennis Davis, counsel for the Trustee,
15 in order to clarify that the Trustee did not intend that the Agreement for Purchase of the fraudulent
16 conveyance claim would allow YKF to recover on behalf of the estate free and clear of MFT's
17 security interest.

18 18. A true and correct copy my correspondence to Mr. Davis dated July 10, 2007, is
19 attached hereto as Exhibit K.

20 19. On or about, July 11, 2007, I spoke with Mr. Davis and confirmed with him that the
21 Agreement for the purchase of the fraudulent conveyance claim does not transfer the fraudulent
22 conveyance claim free and clear of liens, and the claim would be taken subject to MFT's interest in
23 the subject shares.

24 20. Then on July 12, 2007, I wrote a letter to Mr. Davis confirming our telephone
25 conversation. I received no objection to such correspondence from counsel for the Trustee.

26 21. A true and correct copy my correspondence to Mr. Davis dated July 12, 2007, is
27 attached hereto as Exhibit L.
28

1 22. On April 17, 2002, while Mr. Popov owned 3,744,000 shares of Smart Alec's and
2 was President of Smart Alec's, he executed a promissory note for payment of legal services
3 performed by MFT, in an amount of \$45,648 along with "such additional sums which may accrue
4 from the legal services being provided" ("Note").

5 23. On April 17, 2002, Mr. Popov pledged the 3,744,000 shares of Smart Alec's that he
6 then owned as collateral to secure payment of the Note, and he executed a guarantee by Smart
7 Alec's for performance under the Note.

8 24. The Note provided for the collection of attorneys fees and costs incurred in the
9 enforcement of its terms.

10 25. A true and correct copy of the promissory note and the guarantee entered into by
11 Mr. Popov is attached hereto as Exhibit M.

12 26. MFT's interest in the Shares was perfected subsequently by filing a UCC-1 filing
13 statement with the California Secretary of State on May 10, 2002, which filing was amended on
14 April 20, 2007 to reflect MFT's continuing interest in the shares subsequent to the Debtor's
15 discharge in the Bankruptcy Action.

16 27. A true and correct copy of the UCC Statements I filed with California Secretary of
17 State is attached hereto as Exhibit N.

18 28. A copy of the Note to was mailed to Ms. Dodson on January 27, 2003 to provide
19 notice of MFT's secured interest.

20 29. A true and correct copy of the letter that was sent to Dodson enclosing the Note is
21 attached hereto as Exhibit O.

22 30. MFT filed an action in state court against Dodson and Smart Alec's on July 17,
23 2007 ("State Action") based upon the guarantee by Smart Alec's and the Note executed by Mr.
24 Popov on April 17, 2002.

25 31. A true and correct copy of the Complaint in the State Action is attached hereto as
26 Exhibit P.

27 32. A true and correct copy of the Complaint that I intend to file on behalf of MFT
28 requesting declaratory relief in this matter is attached hereto as Exhibit Q.

1 The foregoing is within my personal knowledge and if called to testify, I would relate the
2 same information. I declare under penalty of perjury under the laws of the State of California that
3 the foregoing is true and correct.

4 Dated:

11/13/07


MARK D. BYRNE

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET, 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE (415) 371-8000
FACSIMILE (415) 371-8001

Exhibit A

B104 (FORM 104) (08/07)

| | | |
|--|--|--|
| ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse) | | ADVERSARY PROCEEDING NUMBER (Court Use Only) |
| PLAINTIFFS Yugen Kaisha, Y.K.F. | | DEFENDANTS Stephanie Dodson |
| ATTORNEYS (Firm Name, Address, and Telephone No.) James S. Monroe (State Bar No. 102328) Nixon Peabody LLP, One Embarcadero Center, 18th Floor San Francisco, CA 94111; Telephone: (415) 984-8200 | | ATTORNEYS (If Known) |
| PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee | | PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee |
| CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Complaint to avoid and recover fraudulent transfer of corporate stock by debtor to defendant and injunctive relief. 11 U.S.C. §§ 544(b)(1), 548 & 550. | | |
| NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.) | | |
| <div style="display: flex; justify-content: space-between;"> <div style="width: 48%;"> <p>FRBP 7001(1) – Recovery of Money/Property</p> <p><input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property</p> <p><input type="checkbox"/> 12-Recovery of money/property - §547 preference</p> <p><input checked="" type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer</p> <p><input checked="" type="checkbox"/> 14-Recovery of money/property - other</p> <p>FRBP 7001(2) – Validity, Priority or Extent of Lien</p> <p><input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property</p> <p>FRBP 7001(3) – Approval of Sale of Property</p> <p><input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h)</p> <p>FRBP 7001(4) – Objection/Revocation of Discharge</p> <p><input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e)</p> <p>FRBP 7001(5) – Revocation of Confirmation</p> <p><input type="checkbox"/> 51-Revocation of confirmation</p> <p>FRBP 7001(6) – Dischargeability</p> <p><input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims</p> <p><input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud</p> <p><input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny</p> <p style="text-align: center;">(continued next column)</p> </div> <div style="width: 48%;"> <p>FRBP 7001(6) – Dischargeability (continued)</p> <p><input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support</p> <p><input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury</p> <p><input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan</p> <p><input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)</p> <p><input type="checkbox"/> 65-Dischargeability - other</p> <p>FRBP 7001(7) – Injunctive Relief</p> <p><input type="checkbox"/> 71-Injunctive relief – imposition of stay</p> <p><input checked="" type="checkbox"/> 72-Injunctive relief – other</p> <p>FRBP 7001(8) Subordination of Claim or Interest</p> <p><input type="checkbox"/> 81-Subordination of claim or interest</p> <p>FRBP 7001(9) Declaratory Judgment</p> <p><input type="checkbox"/> 91-Declaratory judgment</p> <p>FRBP 7001(10) Determination of Removed Action</p> <p><input type="checkbox"/> 01-Determination of removed claim or cause</p> <p>Other</p> <p><input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i></p> <p><input type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)</p> </div> </div> | | |
| <input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law | | <input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23 |
| <input type="checkbox"/> Check if a jury trial is demanded in complaint | | Demand \$ According to proof |
| Other Relief Sought | | |

B104 (FORM 104) (08/07), Page 2

| BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES | | |
|--|---|---|
| NAME OF DEBTOR Alexander N. Popov | BANKRUPTCY CASE NO. 05-32929 | |
| DISTRICT IN WHICH CASE IS PENDING Northern District of California | DIVISION OFFICE San Francisco | NAME OF JUDGE Thomas E. Carlson |
| RELATED ADVERSARY PROCEEDING (IF ANY) | | |
| PLAINTIFF | DEFENDANT | ADVERSARY PROCEEDING NO. |
| DISTRICT IN WHICH ADVERSARY IS PENDING | DIVISION OFFICE | NAME OF JUDGE |
| SIGNATURE OF ATTORNEY (OR PLAINTIFF) Nixon Peabody LLP By: /s/ James S. Monroe | | |
| DATE September 5, 2007 | PRINT NAME OF ATTORNEY (OR PLAINTIFF) James S. Monroe | |

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 104, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

B 250B (CANB)

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re ALEXANDER N. POPOV

Bankruptcy Case No.

05-32929

YUGEN KAISHA, Y.K.F.

Debtor

Adversary Proceeding No.

STEPHANIE DODSON

Plaintiff

Defendant

SUMMONS AND NOTICE OF STATUS CONFERENCE
IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the Clerk of the Bankruptcy Court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the complaint within 35 days.

Address of Clerk
United States Bankruptcy Court
235 Pine Street
San Francisco, CA 94104-2701

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Name and Address of Plaintiff's Attorney
James S. Monroe Esq. (SBN 102328)
Nixon Peabody LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94120

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

YOU ARE NOTIFIED that a status conference of the proceeding commenced by the filing of the complaint will be held at the following time and place.

| | |
|-----------------------------------|---------------|
| Address | Room |
| United States Bankruptcy Court | 23 |
| Honorable Judge Thomas E. Carlson | Date and Time |
| 235 Pine Street | |
| San Francisco, CA 94120 | |

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT. PLAINTIFF SHALL PROMPTLY SERVE A COPY OF THE BANKRUPTCY DISPUTE RESOLUTION PROGRAM INFORMATION SHEET ON ALL PARTIES. A COPY OF THE INFORMATION SHEET IS AVAILABLE ON THE COURT'S WEB SITE AT WWW.CANB.USCOURTS.GOV, AND THE CLERK'S OFFICE.

Clerk of the Bankruptcy Court

By:

Date

Deputy Clerk

CERTIFICATE OF SERVICE

I, _____, certify that I am, and at all times during the service
(name)
of process was, not less than 18 years of age and not a party to the matter concerning which service of
process was made. I further certify that the service of this summons and a copy of the complaint was made
_____ by:
(date)

☐ Mail Service: Regular, first-class United States mail, postage fully pre-paid, addressed to:

☐ Personal Service: By leaving the process with defendant or with an officer or agent of defendant at:

☐ Residence Service: By leaving the process with the following adult at:

☐ Publication: The defendant was served as follows: [Describe briefly]:

☐ State Law: The defendant was served pursuant to the laws of the State of _____,
as follows: [Describe briefly] (name of state)

Under penalty of perjury, I declare that the foregoing is true and correct.

Date

Signature

| | | |
|------------------|-------|-----|
| Print Name | | |
| Business Address | | |
| City | State | Zip |

James S. Monroe, Esq. (State Bar Number: 102328)
Gregory E. Schopf (State Bar Number: 122862)
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996
Telephone: (415) 984-8200
Facsimile: (415) 984-8300
E-mail: jmonroe@nixonpeabody.com

Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER N. POPOV,

Debtor.

Case No. 05-32929

Chapter 7

YUGEN KAISHA, Y.K.F.,

Plaintiff,

v.

STEPHANIE DODSON,

Defendant.

Adv. Pro. No.:

**COMPLAINT TO AVOID AND RECOVER
FRAUDULENT TRANSFER AND FOR
INJUNCTIVE RELIEF**

YUGEN KAISHA, Y.K.F., a Japanese corporation (the "Plaintiff"), alleges that:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
2. This adversary proceeding is brought pursuant to Rule 7001, *et seq.* of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. §§ 544(b)(1), 548 and 550.

1 3. Venue in this Court is proper pursuant to 28 U.S.C. § 1409 as this adversary
2 proceeding arises under and in connection with the above-captioned case under 11 U.S.C. § 101, *et*
3 *seq.* (the "Bankruptcy Code"), which is pending in this District.

4 4. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(H).

5 **PARTIES AND BACKGROUND FACTS**

6 5. On September 6, 2005 (the "Petition Date") Alexander N. Popov (the "Debtor") filed a
7 voluntary petition for relief under Chapter 7 of the Bankruptcy Code, commencing the above-
8 captioned bankruptcy case (the "Bankruptcy Case").

9 6. Thereafter, E. Lynn Schoenmann (the "Trustee") became the duly appointed Chapter 7
10 Trustee to administer the Debtor's bankruptcy estate (the "Estate").

11 7. Prior to the filing of the Bankruptcy Case, the Debtor was the owner of record of
12 3,744,000 shares of common stock (the "Shares") of Smart Alec's Intelligent Food, Inc., a California
13 corporation ("Smart Alec's").

14 8. Plaintiff is informed and believes and thereon alleges that defendant Stephanie
15 Dodson, an individual (the "Defendant"), is the spouse of the Debtor and resides at 2032 Donald
16 Drive, Moraga, California 94556.

17 9. Plaintiff is informed and believes and thereon alleges that in or about August 2005, the
18 Debtor transferred all right, title and interest in the Shares to the Defendant.

19 10. On or about August 1, 2007, Plaintiff and the Trustee entered into an Assignment
20 Agreement, pursuant to an Order Authorizing and Approving Assignment of Personal Property to
21 Yugen Kaisha, Y.K.F. (the "Approval Order"), entered in the Bankruptcy Case on or about July 31,
22 2007, whereby the Trustee sold, transferred, assigned, granted and conveyed to Plaintiff, in exchange
23 for Plaintiff's payment of \$30,000 to the Trustee and the Estate, all rights, claims, causes of action
24 and remedies of the Trustee and the Estate, or assertable thereby, to avoid and recover the Debtor's
25 purported transfer of the Shares to Defendant and/or any subsequent transferee thereof as a fraudulent
26 transfer under any applicable law, including without limitation, Bankruptcy Code §§ 544(b), 548 and
27 550, and California Civil Code §§ 3439-3439.12, inclusive, and any and all right, title and interest of

1 the Estate in and to the Shares (the "Assigned Claims and Causes of Action"). True and correct
 2 copies of the Assignment Agreement and the Approval Order are attached hereto, respectively, as
 3 Exhibits 1 and 2 and incorporated herein.

4 11. Pursuant to the Assignment Agreement and Approval Order, Plaintiff has the right,
 5 *inter alia*, to enforce, sue on, settle and compromise the Assigned Claims and Causes of Action,
 6 including claims under §§ 544(b)(1), 548 and 550 of the Bankruptcy Code.

7 CLAIMS FOR RELIEF

8 **FIRST CAUSE OF ACTION**

9 **(Avoidance and Recovery of Fraudulent Transfer under Bankruptcy Code § 548(a)(1)(A))**

10 12. Plaintiff repeats, realleges and incorporates by reference the allegations contained in
 11 paragraphs 1 through 11 of this Complaint as though fully set forth herein.

12 13. Plaintiff is informed and believes and thereon alleges that in or about August 2005 the
 13 Debtor transferred all of his right, title and interest in and to the Shares to the Defendant for no
 14 consideration or nominal consideration of no more than \$12,500 (the "Transfer").

15 14. Plaintiff is informed and believes and thereon alleges that the Debtor made the
 16 Transfer with the actual intent to hinder, delay, or defraud all of the Debtor's then and future creditors
 17 by wrongfully removing the Shares as an asset of the Debtor's Estate shortly before the Petition Date
 18 to enable the Debtor and the Defendant to retain control of Smart Alec's, a valuable and profitable
 19 restaurant, to the exclusion of the Debtor's unsecured creditors.

20 15. Plaintiff is informed and believes and thereon alleges that the Defendant received the
 21 Transfer with knowledge that the Debtor intended to hinder, delay, or defraud all of his then and
 22 future creditors and actively participated and colluded with the Debtor in structuring and effecting the
 23 Transfer with the purpose of removing the Shares from the Estate and to thereby retain control of
 24 Smart Alec's to the exclusion of the Debtor's unsecured creditors.

25 16. Plaintiff is informed and believes and thereon alleges that in furtherance of the
 26 foregoing, the Debtor and the Defendant executed a Share Purchase Agreement for the Shares in or
 27 about August 2005 which they backdated to April 18, 2004 to make the Transfer appear less

1 fraudulent and to establish consideration for the Transfer based upon certain prior cash transfers from
2 Defendant to the Debtor totaling \$12,500 which were originally made for an unrelated purpose. A
3 true and correct copy of the Share Purchase Agreement is attached hereto as Exhibit 3 and
4 incorporated herein by this reference.

5 17. Defendant did not receive the Transfer in good faith and did not pay reasonably
6 equivalent value for the Transfer.

7 18. As reflected in the Debtor's bankruptcy schedules filed in the Bankruptcy Case, there
8 are numerous general unsecured creditors of the Debtor who have allowable claims against him
9 which claims were in existence at the time of the Transfer (the "Unsecured Creditors").

10 19. As a proximate result of the wrongful acts of the Debtor and the Defendant, the
11 Transfer was fraudulent and must be declared null and void and set aside.

12 20. The Transfer, to the extent it is avoided pursuant to § 548 of the Bankruptcy Code,
13 may be recovered by Plaintiff pursuant to § 550(a)(1) of the Bankruptcy Code.

14 **SECOND CAUSE OF ACTION**
15 **(Avoidance and Recovery of Fraudulent Transfer under Bankruptcy Code §544(b)(1)**
and California Civil Code §3439.04(a)(1))

16 21. Plaintiff repeats, realleges and incorporates by reference the allegations contained in
17 paragraphs 1 through 20 of this Complaint as though fully set forth herein.

18 22. Based upon the foregoing, the Transfer is voidable by the Unsecured Creditors under
19 California Civil Code §3439.04(a)(1) and is voidable by Plaintiff as assignee of the Trustee pursuant
20 to Bankruptcy Code §544(b)(1).

21 **THIRD CAUSE OF ACTION**
22 **(Avoidance and Recovery of Fraudulent Transfer under Bankruptcy Code §548(a)(1)(B))**

23 23. Pleading in the alternative, Plaintiff repeats, realleges and incorporates by reference
24 the allegations contained in paragraphs 1 through 13, 17, 18 and 20 of this Complaint as though fully
25 set forth herein.

26 24. The Transfer was to or for the benefit of the Defendant.

25. Plaintiff is informed and believes and thereon alleges that the Debtor received less than reasonably equivalent value in exchange for the Transfer.

26. Plaintiff is informed and believes and thereon alleges that Debtor was: (i) insolvent on the date of the Transfer, or became insolvent as a result of the Transfer; and/or (ii) engaged in business or a transaction for which any property remaining with the Debtor was an unreasonably small capital at the time of, or as a result of the Transfer.

FOURTH CAUSE OF ACTION
(Avoidance and Recovery of Fraudulent Transfer under Bankruptcy Code § 544(b)(1)
and California Civil Code § 3439.05)

27. Pleading in the alternative, Plaintiff repeats, realleges and incorporates by reference the allegations contained in paragraphs 1 through 13, 17, 18, 20 and 24 through 26 of this Complaint as though fully set forth herein.

28. Plaintiff is informed and believes and thereon alleges that at the time of the Transfer, the Debtor was insolvent or in the alternative such Transfer rendered the Debtor insolvent.

29. Based upon the foregoing, the Transfer is voidable by the Unsecured Creditors under California Civil Code § 3439.05 and is voidable by Plaintiff as assignee of the Trustee pursuant to Bankruptcy Code § 544(b)(1).

FIFTH CAUSE OF ACTION
(Injunctive Relief under Rule 7065 of the Federal Rules of Bankruptcy Procedure and
California Civil Code § 3439.07)

30. Plaintiff repeats, realleges and incorporates by reference the allegations contained in paragraphs 1 through 29 of this Complaint as though fully set forth herein.

31. At present there is nothing to prevent the Defendant from transferring some or all of the Shares and/or interests therein to third parties and/or from secreting or dissipating any proceeds from a sale or other disposition of the Shares.

32. Such acts, unless enjoined, will cause Plaintiff great or irreparable injury for which it has no adequate remedy at law.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. That the Transfer of the Shares to Defendant be set aside and declared null and void;

2. That the Defendant be required to transfer and deliver up the Shares to Plaintiff;
3. That Defendant and her representatives, attorneys, and agents be enjoined and restrained from selling, transferring, conveying, or otherwise disposing of any of the Shares or of any interest therein until Plaintiff's rights to the Shares have been fully adjudicated and that a temporary restraining order and preliminary injunction be granted to Plaintiff herein;
4. That the judgment herein be declared a lien on the Shares;
5. That an order be made declaring that the Defendant holds the Shares in trust for the Plaintiff;
6. That Defendant be required to account to Plaintiff for all profits and proceeds earned from or taken in exchange for the Shares and/or attributable to her equity interest in Smart Alec's based upon the Shares;
7. That if the Defendant has disposed of any of the Shares or any interest therein, that she be required to account to Plaintiff for the proceeds;
8. For compensatory damages according to proof;
9. For costs of suit incurred herein; and
10. For such other and further relief as the Court may deem proper.

Dated: September 5, 2007

NIXON PEABODY LLP

By: /s/ James S. Monroe
James S. Monroe
Attorneys for Yugen Kaisha, Y.K.F.

EXHIBIT 1

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT (this "Agreement") is made by and between E. Lynn Schoenmann, trustee (the "Trustee") of the Chapter 7 bankruptcy estate of Alexander N. Popov, bankruptcy case number 05-32929, and Yugen Kaisha, Y.K.F., a Japanese corporation ("YKF").

WITNESSETH

WHEREAS, on September 6, 2005, Alexander N. Popov (the "Debtor") filed a voluntary petition for relief pursuant to Chapter 7 of the United States Bankruptcy Code (the "Bankruptcy Case") in the United States Bankruptcy Court, Northern District of California, San Francisco Division (the "Bankruptcy Court") and the Trustee was thereafter duly appointed to administer the Debtor's Chapter 7 bankruptcy estate (the "Estate");

WHEREAS, prior to the filing of the Bankruptcy Case, (a) the Debtor was the owner of record of 3,744,000 shares of common stock of Smart Alec's Intelligent Food, Inc., a California corporation, (the "Shares"), and (b) the Debtor purportedly sold all of his right, title, and interest in the Shares to Stephanie Dodson ("Dodson") for \$12,500; and

WHEREAS, the Trustee desires to sell to YKF, and YKF desires to purchase from the Trustee, the Assigned Property (as defined herein);

NOW, THEREFORE, in consideration of the recitals, mutual covenants and conditions contained herein, the parties agree as follows:

1. Definitions. The following capitalized terms shall have the meanings as set forth below:

"Assigned Property" means any and all rights, claims, causes of action and remedies of the Trustee and the Estate, or assertable thereby, to avoid and recover the Debtor's purported transfer of the Shares to Dodson and/or any subsequent transferee thereof as a fraudulent transfer under any applicable law, including, without limitation, Bankruptcy Code §§ 544(b), 548 and 550, and California Civil Code §§ 3439-3439.12, inclusive; and any and all right, title and interest of the Estate in and to the Shares.

"Proceeds" means whatever is recovered, collected, acquired, received, distributed or otherwise obtained on account of or with respect to the Assigned Property.

"Purchase Price" means \$30,000.00.

2. Effective Date. This Agreement shall become effective when (a) each of the parties hereto and their counsel shall have duly executed and delivered this Agreement, and (b) the Bankruptcy Court shall have entered an order approving this Agreement. The first business day on which all of the foregoing conditions have been satisfied shall be referred to herein as the "Effective Date."

3. Bankruptcy Court Approval. The Trustee shall have the obligation to file and serve an appropriate motion requesting Bankruptcy Court approval of this Agreement (the "Approval Order"). The parties shall cooperate as reasonably required in seeking the Approval Order. This Agreement is contingent upon entry of the Approval Order and, in the absence thereof, this Agreement is null and void. In the event an appeal is taken from the Approval Order, (a) YKF shall have the sole and complete responsibility to assume any defense of the appeal and shall bear any and all attorneys' fees, costs, expenses, losses, obligations, liabilities and damages that may be incurred in connection therewith, (b) the Trustee shall have no

obligation to defend such appeal, and (c) this Agreement shall nonetheless become effective and bind the parties as provided in paragraph 2 hereof.

4. Assignment and Purchase. Subject to the terms and conditions of this Agreement, the Trustee hereby agrees to sell, transfer, assign, grant and convey the Assigned Property to YKF, its successors and assigns, YKF agrees to purchase the Assigned Property from the Trustee, and YKF shall be solely entitled to exercise and enforce all rights with respect to the Assigned Property and to collect and receive any and all Proceeds.

5. Payment. In consideration of the sale and assignment of the Assigned Property, YKF shall pay the Purchase Price to the Trustee within 2 business days after the Effective Date in immediately available funds by wire transfer to an account specified in writing by the Trustee.

6. Representations and Warranties of Trustee. The Trustee represents and warrants that it has made no prior assignment of the Assigned Property or of any interest therein and that the Trustee is the sole owner thereof and has good title thereto, free and clear of all liens, claims and encumbrances of any kind and will transfer to YKF such title, free and clear of any liens or encumbrances of any kind.

7. YKF's Acknowledgements. YKF acknowledges to the Trustee that except as expressly set forth in this Agreement, the Trustee does not make, and hereby disclaims any and all, representation or warranties regarding the Assigned Property. YKF acknowledges and agrees that the Assigned Property is acquired by YKF for its own account and risk and that the sale of the Assigned Property to YKF is a sale without recourse against the Trustee and/or the Estate and without obligation of the Trustee and/or the Estate to repurchase the Assigned Property under any circumstances.

8. No Reliance; Independent Investigation. The undersigned agree that each party hereto in entering into this Agreement relies upon its own investigation and judgment in regard to all matters herein contained and that they have not relied on any representations made by the other parties, that this Agreement is made and entered into by each of the parties of its own volition, and each of the parties hereto warrants that this Agreement was made and entered into free of any duress, coercion, or undue influence from any source whatsoever.

9. Merger. It is expressly understood and agreed that this Agreement constitutes the complete and final agreement among the parties regarding the matters herein addressed. Any and all prior negotiations, representations, understandings or agreements, whether written or oral, among the parties, relating to the subject matter of this Agreement and the facts as set forth in the recitals hereto are terminated and shall be of no further force or effect.

10. Amendments. No amendment, modification, termination, or waiver of any provision of this Agreement shall in any event be effective unless the same shall be in writing and signed by all parties hereto.

11. Authority. Each of the parties to this Agreement has full authority and power to enter into this Agreement and this Agreement is the legal, valid and binding obligation thereof.

12. Drafting of Agreement. The undersigned agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to any interpretation of this Agreement.

13. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns.

14. Governing Law. This Agreement shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the State of California applicable to agreements made and to be performed wholly within the State of California, as well as any applicable United States bankruptcy law. The Bankruptcy Court shall retain jurisdiction over any disputes regarding this Agreement or enforcement of this Agreement.

15. Attorneys' Fees. In the event that any legal proceeding, of any kind or nature, is brought by any party concerning the enforcement or interpretation of this Agreement, or any rights and duties hereunder, the prevailing party shall be entitled to recover its attorneys' fees and costs incurred in said proceedings.

16. Counterparts. This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any of the parties hereto may execute this Agreement by signing any such counterparts. Photocopies or facsimiles of executed copies of this Agreement may be treated as originals.

17. Further Assurances. The parties and their counsel shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement.

18. Captions. The captions appearing at the commencement of the paragraphs hereof are descriptive only and for convenience of reference. Should there be any conflict, or apparent conflict, between any such caption and any paragraph at the head of which it appears, the content of the paragraph shall govern the construction of this Agreement.

19. Partial Invalidity. If any provision of this Agreement is found to be invalid by any court, the invalidity of such provision shall not affect the validity of the remaining provisions hereof.

20. Survival of Representations and Warranties. The representations and warranties made by the parties herein shall survive the performance of this Agreement.

21. Notice. Any notice, request, demand, or other communication required or permitted hereunder will be given in writing by first-class mail, postage prepaid, to the party(ies) to be notified. All communications will be deemed given when received. The addresses of the parties for the purposes of such communication are:

Trustee: E. Lynn Schoenmann
c/o Dennis D. Davis, Esq.
Goldberg, Stinnett, Meyers & Davis
44 Montgomery Street, Suite 2900
San Francisco, CA 94104

YKF: Yugen Kaisha, Y.K.F.
c/o James S. Monroe, Esq.
Nixon Peabody LLP
One Embarcadero Center
San Francisco, CA 94111

A party may change his or her address for purposes of notice hereunder only upon written notice to the other party as provided hereinabove.

[Signature Page Follows]

02/20/2003 18:49 9896590320

SCHOENMANN

PAGE 01/01

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be duly executed on the date appearing opposite their names hereinbelow.

Dated: July 1, 2007

E. Lynn Schoenmann, Trustee of the
Chapter 7 Bankruptcy Estate of Alexander
N. Popov

By: [Signature]
E. Lynn Schoenmann

Dated: June 8, 2007

YUGEN KAISHA, Y.K.F.

By: [Signature]
Its: President

APPROVED AS TO FORM AND CONTENT:

Nixon Peabody LLP

By: [Signature]
James S. Monroe, Esq.
Attorneys for Yugen Kaisha, Y.K.F.

Goldberg, Stinnett, Meyers & Davis

By: [Signature]
Dennis D. Davis, Esq.
Attorneys for E. Lynn Schoenmann, Trustee

EXHIBIT 2

Entered on Docket
July 31, 2007
GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



GOLDBERG, STINNETT, DAVIS & LINCHEY
A Professional Corporation
DENNIS D. DAVIS, ESQ. CA Bar #070591
44 Montgomery Street, Suite 2900
San Francisco, CA 94104
Telephone: (415) 362-5045
Facsimile: (415) 362-2392
Email: ddavis@gsmddl.com

Signed and Filed: July 30, 2007


THOMAS E. CARLSON
U.S. Bankruptcy Judge

Attorneys for E. Lynn Schoenmann, Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

Case No. 05-32929

ALEXANDER POPOV,

Chapter 7

Debtor.

**ORDER AUTHORIZING AND APPROVING ASSIGNMENT
OF PERSONAL PROPERTY TO YUGEN KAISHA, Y.K.F.**

Upon the Application for Entry of Order by Default Authorizing Sale of Personal Property to Yuguen Kaisha, Y.K.F. for an order authorizing and approving the Trustee's assignment of personal property to Yuguen Kaisha, Y.K.F., as more fully set forth in the Notice of Trustee's Assignment of Personal Property to Yuguen Kaisha, Y.K.F. filed herein June 26, 2007, and the Declaration of Dennis D. Davis filed in support of said application, submitted, no objections or requests having been filed or served, following date and adequate notice on appropriate parties, and

GOOD CAUSE APPEARING THEREFOR,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Trustee's application is granted in its entirety.
2. On the terms set forth in the notice, this Court hereby authorizes and approves the

-1-

ORDER AUTHORIZING AND APPROVING ASSIGNMENT
OF PERSONAL PROPERTY TO YUGEN KAISHA, Y.K.F.
113282.DOC

1 Trustee's assignment of personal property to Yugen Kaisha, Y.K.F., pursuant to the terms of the
2 Assignment Agreement, a copy of which is attached as Exhibit "B" to the Declaration of Dennis Davis
3 filed in support of the application.

4 3. The Trustee is authorized to take any and all reasonably necessary steps to effectuate the
5 terms of this order.
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8 **END OF ORDER**
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COURT SERVICE LIST

Dennis D. Davis, Esq.
Goldberg, Stinnett, Meyers & Davis
44 Montgomery Street, Suite 2900
San Francisco, CA 94104

Office of the U.S. Trustee
235 Pine Street, Suite 700
San Francisco, CA 94104-3401

E. Lynn Schoenmann
800 Powell Street
San Francisco, CA 94108

James S. Monroe, Esq.
Nixon Peabody LLP
Two Embarcadero Center, Suite 2700
San Francisco, CA 94111-3996

EXHIBIT 3

Aug 31 05 12:28p

Alexander Popov

415-474-4554

p.1

Share Purchase Agreement

THIS SHARE PURCHASE AGREEMENT (the "Agreement") made and entered into this 18th day of April, 2004 (the "Execution Date"),

BETWEEN

Alex Popov of 2015 Laguna Street #8, San Francisco, CA 94115
(the "Seller")

and

Stephanie Dodson of 5728 Owens Dr. 206 Pleasanton, CA 94588
(the "Purchaser")

BACKGROUND

- A. The Seller is the owner of record of an aggregate of 3,744,000 common shares (the "Shares") of Smart Alec's Intelligent Food, Inc. (the "Corporation").
- B. The Seller desires to sell the Shares to the Purchaser and the Purchaser desires to purchase the Shares from the Seller.

IN CONSIDERATION OF and as a condition of the parties entering into this Agreement and other valuable consideration, the receipt and sufficiency of which consideration is acknowledged, the parties to this Agreement agree as follows:

Purchase and Sale

1. The Seller agrees to sell and the Purchaser agrees to purchase all the residual rights, title, interest, and property of the Seller in the Shares for an aggregate purchase price of *Twelve Thousand Five Hundred Dollars (\$12,500)* (the "Purchase Price").
2. Payments by the Purchaser shall be as follows:
 - a. \$5,000 payable at the signing of this Agreement.
 - b. \$5,000 payable before December 31st, 2004
 - c. \$2,500 payable before March 31st, 2005

Share Purchase Agreement

Page 1/3

Aug 31 00 12:28p

Alexander Popov

415-474-4554

p.2

Representations and Warranties of the Seller

3. The Seller warrants and represents to the Purchaser as follows:
- a. The Shares are currently pledged as collateral for repayment of \$775,000 to the YKF Corporation.
 - b. The Purchaser is purchasing the residual value of the rights, title, and interest in the Shares after YKF is repaid a total of \$775,000 by December 31st, 2008.
 - c. The repayment of \$775,000 must occur before December 31st, 2008 or YKF may foreclose on the Shares.
 - d. Upon repayment to YKF, Purchaser shall become the rightful owner of the Shares and take immediate possession of the Shares.
 - e. Upon repayment to YKF, Purchaser shall be sole shareholder of the Corporation.
 - f. Except as provided in the incorporating documents of the Corporation or as indicated on the face of the certificates for the Shares, the Purchaser would not be prevented or restricted in any way from re-selling the Shares in the future.

Miscellaneous.

- (a) The parties agree to cooperate with each other in executing and delivering all further documents necessary to effect the purchase and sale of the Shares, and both parties agree to cooperate with the other for purposes of effecting the other terms of this Agreement.
- (b) All representations, warranties, covenants, and obligations in this Agreement will survive the Closing.
- (c) The parties agree that the terms of this Agreement, and the discussion relating to this Agreement, are and shall remain privileged and confidential as between the parties.
- (d) This Agreement contains the entire agreement of the parties hereto with respect to the purchase of the Shares and the other transactions contemplated herein, and supersedes all prior understandings and agreements of the parties with respect to the subject matters hereof.
- (e) All notices, requests, consents and other communications required or permitted hereunder shall be in writing and shall be hand delivered or mailed postage prepaid by registered or certified mail or transmitted by facsimile transmission (with immediate telephonic confirmation thereafter).

Share Purchase Agreement

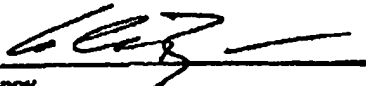
Page 2/3

Aug 31 05 12:29p Alexander Popov

415-474-4554

p.3

IN WITNESS WHEREOF, each of the undersigned has duly executed, or caused its authorized officer to duly execute, this Agreement as of the date first set forth above.



Alex Popov
2015 Laguna Street #8
San Francisco, CA 94115

4-18-04
Date:



Stephanie Dodson
5728 Owens Dr. 206
Pleasanton, CA 94588

4-18-04
Date:

Share Purchase Agreement

Page 3/3

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET., 16TH FLOOR
SAN FRANCISCO, CA 94103-2749
TELEPHONE: (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit B

Share Purchase Agreement

THIS SHARE PURCHASE AGREEMENT (the "Agreement") made and entered into this 18th day of April, 2004 (the "Execution Date"),

BETWEEN

Alex Popov of 2015 Laguna Street #8, San Francisco, CA 94115
(the "Seller")

and

Stephanie Dodson of 5728 Owens Dr. 206 Pleasanton, CA 94588
(the "Purchaser")

BACKGROUND

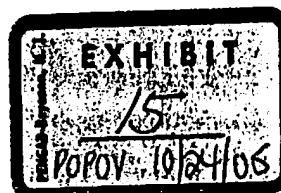
- A. The Seller is the owner of record of an aggregate of 3,744,000 common shares (the "Shares") of Smart Alec's Intelligent Food, Inc. (the "Corporation").
- B. The Seller desires to sell the Shares to the Purchaser and the Purchaser desires to purchase the Shares from the Seller.

IN CONSIDERATION OF and as a condition of the parties entering into this Agreement and other valuable consideration, the receipt and sufficiency of which consideration is acknowledged, the parties to this Agreement agree as follows:

Purchase and Sale

1. The Seller agrees to sell and the Purchaser agrees to purchase all the residual rights, title, interest, and property of the Seller in the Shares for an aggregate purchase price of Twelve Thousand Five Hundred Dollars (\$12,500) (the "Purchase Price").
2. Payments by the Purchaser shall be as follows:
 - a. \$5,000 payable at the signing of this Agreement.
 - b. \$5,000 payable before December 31st, 2004
 - c. \$2,500 payable before March 31st, 2005

Share Purchase Agreement



Page 1/3

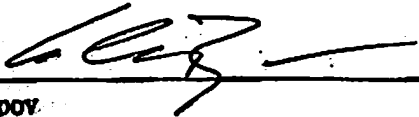
Representations and Warranties of the Seller

3. The Seller warrants and represents to the Purchaser as follows:
- a. The Shares are currently pledged as collateral for repayment of \$775,000 to the YKF Corporation.
 - b. The Purchaser is purchasing the residual value of the rights, title, and interest in the Shares after YKF is repaid a total of \$775,000 by December 31st, 2008.
 - c. The repayment of \$775,000 must occur before December 31st, 2008 or YKF may foreclose on the Shares.
 - d. Upon repayment to YKF, Purchaser shall become the rightful owner of the Shares and take immediate possession of the Shares.
 - e. Upon repayment to YKF, Purchaser shall be sole shareholder of the Corporation.
 - f. Except as provided in the incorporating documents of the Corporation or as indicated on the face of the certificates for the Shares, the Purchaser would not be prevented or restricted in any way from re-selling the Shares in the future.

Miscellaneous.


- (a) The parties agree to cooperate with each other in executing and delivering all further documents necessary to effect the purchase and sale of the Shares, and both parties agree to cooperate with the other for purposes of effecting the other terms of this Agreement.
- (b) All representations, warranties, covenants, and obligations in this Agreement will survive the Closing.
- (c) The parties agree that the terms of this Agreement, and the discussion relating to this Agreement, are and shall remain privileged and confidential as between the parties.
- (d) This Agreement contains the entire agreement of the parties hereto with respect to the purchase of the Shares and the other transactions contemplated herein, and supersedes all prior understandings and agreements of the parties with respect to the subject matters hereof.
- (e) All notices, requests, consents and other communications required or permitted hereunder shall be in writing and shall be hand delivered or mailed postage prepaid by registered or certified mail or transmitted by facsimile transmission (with immediate telephonic confirmation thereafter),

IN WITNESS WHEREOF, each of the undersigned has duly executed, or caused its authorized officer to duly execute, this Agreement as of the date first set forth above.



Alex Popov
2015 Laguna Street #8
San Francisco, CA 94115

4-18-04
Date:



Stephanie Dodson
5728 Owens Dr. 206
Pleasanton, CA 94588

4-18-04
Date:

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET, 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit C

(Official Form 1) (12/03)

Voluntary Petition*(This page must be completed and filed in every case)*

Name of Debtor(s):

Popov, Alexander N.**Prior Bankruptcy Case Filed Within Last 6 Years** (If more than one, attach additional sheet)

Location

Where Filed: **None**

Case Number:

Date Filed:

Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)

Name of Debtor:

None

Case Number:

Date Filed:

District:

Relationship:

Judge:

Signatures**Signature(s) of Debtor(s) (Individual/Joint)**

I declare under penalty of perjury that the information provided in this petition is true and correct.

[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under Chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

☒ **/s/ Alexander N. Popov**

Signature of Debtor

Alexander N. Popov☒

Signature of Joint Debtor

Telephone Number (If not represented by attorney)

September 6, 2005

Date

Signature of Attorney☒ **/s/ Joan M. Chipser**

Signature of Attorney for Debtor(s)

Joan M. Chipser 83192

Printed Name of Attorney for Debtor(s)

Joan M. Chipser Attorney-At-Law

Firm Name

1 Green Hills Court

Address

Millbrae, CA 94030**(650) 697-1564**

Telephone Number

September 6, 2005

Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

☒

Signature of Authorized Individual

Printed Name of Authorized Individual

Title of Authorized Individual

Date

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

☒ **/s/ Joan M. Chipser**

Signature of Attorney for Debtor(s)

9/06/05

Date

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☒ Yes, and Exhibit C is attached and made a part of this petition.
☐ No**Signature of Non-Attorney Petition Preparer**

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

Printed Name of Bankruptcy Petition Preparer

Social Security Number (Required by 11 U.S.C. § 110(c).)

Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

☒

Signature of Bankruptcy Petition Preparer

Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. § 110; 18 U.S.C. § 156.

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET, 16TH FLOOR
SAN FRANCISCO, CA 94103-2749
TELEPHONE (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit D

Form CAodsc7

**UNITED STATES BANKRUPTCY COURT
Northern District of California (San Francisco)**

In re:

Alexander N. Popov
aka Alex Popov
2015 Laguna Street
Apt 8
San Francisco, CA 94115

Case Number: 05-32929 TEC 7
Chapter: 7

Debtor(s)

Debtor/Joint Debtor Social Security Number(s):
xxx-xx-0001

DISCHARGE OF DEBTOR

It appearing that the debtor(s) is/are entitled to a discharge, **IT IS ORDERED** :
The debtor(s) is/are granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

Dated: 3/29/07

By the Court:

Thomas E. Carlson
United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.

Doc # 53

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET., 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE: (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit E

1 MARK D. BYRNE, ESQ., SBN 109268
2 LAW OFFICES OF MARTIN F. TRIANO
3 25 Ecker Square, 16th Floor
4 San Francisco, CA 94105
5 Telephone: (415) 371-8000
6 Facsimile: (415) 371-8001
7 Mailbox@martinftriano.com

8 Attorney for Creditor Martin F. Triano

9 UNITED STATES BANKRUPTCY COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 SAN FRANCISCO DIVISION

12) Case Number: 05-32929

13 IN RE)

14) CHAPTER 7

15 ALEXANDER POPOV,)

16) PROOF OF CLAIM ATTACHMENT

17 Debtor.)
18)
19)
20)

21 COMES NOW MARTIN F. TRIANO and makes the following proof of claim:

- 22 1. The basis of the claim regards the following:
- 23 a. The basis of the claim is set forth in the Statement of Claim which was filed in
- 24 arbitration before JAMS in San Francisco. A true and correct copy of such
- 25 arbitration statement is attached as Exhibit A. In addition, please review the
- 26 following information and attached documentation.
- 27 b. Claimant was first retained by Debtor pursuant to an Attorney Client Fee Contract
- 28 and Arbitration Agreement, which was signed and returned by the Debtor on
- October 12, 2001. A true and correct copy of the Attorney Client Fee Contract

1 and Arbitration Agreement is attached as Exhibit B. The nature and extent of
2 legal services provided in the Popov v. Hayashi matter is further set forth in
3 Exhibit C, which more particularly sets forth the work completed, the date work
4 was completed, and the attorney accomplishing the task. As set forth in Exhibit
5 A, the matter proceeded through a 17 day trial, after a judgment was entered in
6 Popov's favor, providing him one half of the value of the baseball. At the time of
7 the trial, the previous record breaking homerun baseball sold for approximately
8 \$3,000,000. The baseball subsequently sold at auction, conducted in a manner
9 against the legal advice of counsel, for the sum of only \$450,000. The total
10 amount of Attorney's fees and costs sought in representing the Debtor on this
11 matter is _____

- 12 c. On August 14, 2002, Claimant was again retained by the Debtor, on an emergency
13 basis, in the matter of YKF v. Popov et. al., wherein the debtor was sued for
14 fraud, among other causes of action. The Plaintiff was seeking injunctive orders,
15 including the appointment of a receiver on the Debtor's business on an ex parte
16 basis. An Attorney Client Fee Contract and Arbitration Agreement was
17 subsequently entered on December 31, 2002. A true and correct copy of the
18 Attorney Client Fee Contract and Arbitration Agreement is attached as Exhibit D.
19 The nature and extent of legal services provided in the YKF v. Popov et. al.,
20 matter is further set forth in Exhibit E, which more particularly sets forth the work
21 completed, the date work was completed, and the attorney accomplishing the task.
22 The total amount of Attorney's fees and costs sought in representing the Debtor
23 on this matter is \$18,864.57, together with interest.
- 24 d. Under the terms of the Attorney Client Fee Contract and Arbitration Agreement in
25 both of the above matters include a provision allowing the recovery of attorneys.
26 In pursuit of the claims owed, Mr. Popov had demanded mediation before BASF,
27 which was subsequently determined to be waived by the Debtor's conduct in
28 filing an action for affirmative relief. After multiple motions and three different

1 appeals by the Debtor (which were all dismissed or rejected), the matter was
2 finally scheduled for arbitration proceedings before the Honorable Richard Patsey
3 (ret) at JAMS San Francisco. The nature and extent of attorneys fees, totaling
4 \$31,350.00, earned by Jonathan Arons on behalf of the claimant is more
5 particularly set forth in Exhibit F. The nature and extent of attorneys fees earned
6 by the associates in the Law Offices of Martin F, Triano on behalf of the claimant
7 is more particularly set forth in Exhibit G. The total amount sought in this proof
8 of claim for the collection of this debt prior to the filing of the bankruptcy is
9 \$ _____

10 2. The Debt was incurred beginning October 12, 2001 up until the filing of the
11 Bankruptcy. See above.

12 3. No judgment has been obtained on any amount sought in this proof of claim.
13 Claimant did obtain a judgment for attorney's fee as costs incurred on one of the affirmative
14 actions brought by the Debtor. Such Judgment was satisfied by the Debtor prior to filing
15 Bankruptcy. No amount contained in the previous judgment has been included in this claim.

16 4. The total value of this secured claim is \$ _____, which includes \$ _____ in
17 attorney fees and \$ _____ in costs, as well as \$134,744.67 in additional interest accumulated at
18 the rate of 10 percent per annum from and after payment was not made on the attorneys' fees,
19 until the date of filing.

20 5. The portion of this claim represented by the fees incurred in representing the
21 Debtor in the matter of Popov v. Hayashi is secured by one-half of the proceeds of the sale of the
22 Baseball, which were obtained as a result of the claims and causes of action brought by Claimant
23 on behalf of Mr. Popov prior to filing of Bankruptcy. Under the terms of the Attorney Client Fee
24 Contract and Arbitration Agreement attached as Exhibit B, a contractual lien exists on such
25 proceeds. At the time of the filing of the Bankruptcy, such funds were held at the Bank of
26 America. Claimant understands that the Chapter 7 Trustee presently has possession of these
27 funds.
28

- 1 a. The entire amount of this claim, including the amount of fees incurred in
2 representing the debtor in Popov v. Hayashi and YKF v. Popov et. al., as well as
3 the attorney's fees and costs incurred in collecting on these matters, are all secured
4 by the Debtor's 3,744,000 shares of stock in Smart Alecs Intelligent Foods. A
5 copy of the promissory note and UCC-1 filing is attached hereto as Exhibit H.
6 Please note that a portion of the promissory note was subsequently redacted so as
7 to represent the Claimant's waiver of certain rights regarding the operation of
8 Smart Alecs Intelligent Foods.
- 9 b. At all times herein relevant, claimant has complied with the provisions of the
10 Rules of Professional Responsibility 3-300, including allowing the debtor
11 sufficient time to obtain independent legal advice prior to the execution of any
12 agreement containing a provision of security for the claimants. Upon request, the
13 claimant can provide written documentation and oral testimony attesting to such
14 compliance.
- 15 c. Please note that although the Debtor contends he has sold the shares, he admitted
16 during his bankruptcy rule 2004 examination that the share certificates themselves
17 are held by YKF; therefore, he has been unable to deliver the share certificates to
18 the alleged purchaser. Please further note that claimant has filed a Complaint to
19 Object to the Discharge of the Debtor, on the basis that the Debtor fraudulently
20 concealed an interest in such shares

21 Respectfully Submitted,
22 Mark D. Byrne, Esq.
23 Law Offices of Martin F. Triano
24 25 Ecker Square, 16th Floor
25 San Francisco, CA 94105

26 Dated: December 2, 2005

27 /s/ Mark D. Byrne
28 MARK D. BYRNE

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET., 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit F

MARK D. BYRNE, ESQ., SBN 109628
LAW OFFICES OF MARTIN F. TRIANO
25 Ecker Square, 16th Floor
San Francisco, CA 94105
Telephone: (415) 371-8000
Facsimile: (415) 371-8001
mailbox@martinftriano.com

Attorney for Creditor Martin F. Triano

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

| | | |
|------------------|---|-------------------------------|
| In re: |) | Case No. 05-32929 |
| |) | Chapter 7 |
| ALEXANDER POPOV, |) | |
| Debtor. |) | Date: March 31, 2006 |
| |) | Time: 9:30 A.M. |
| |) | Place: U.S. Bankruptcy Court |
| |) | 235 Pine St., Courtroom 23 |
| |) | San Francisco, CA. |
| |) | Judge: Hon. Thomas E. Carlson |

**ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND OVERRULING
TRUSTEE'S OBJECTION TO CLAIM**

The above-entitled matter came on regularly for Hearing on March 31, 2006 at 9:30 A.M. in Department 23 before the Honorable Judge Thomas E. Carlson. Dennis Davis, Esq., appeared on behalf of the Chapter 7 Trustee, E. Lynn Schoenmann, as the moving party. Mark D. Byrne, Esq. appeared on behalf of the responding party, the Law Offices of Martin F. Triano. The Debtor did not appear or file any response.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND OVERRULING TRUSTEE'S OBJECTION
TO CLAIM

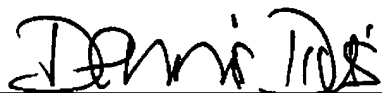
1 Upon review of the pleadings, affidavits and evidence submitted by the parties, having
2 heard oral argument of the parties during the hearing as well as good cause having been
3 otherwise shown; and the Court having made its finding of fact and conclusions of law on the
4 record:

5 IT IS HEREBY ORDERED:

- 6 1. The Trustee's Motion for Summary Judgment is denied.
7 2. The Trustee's objection to Martin F. Triano dba Law Offices of Martin F. Triano's
8 claim is overruled.
9 3. Martin F. Triano dba Law Offices of Martin F. Triano has a valid and enforceable
10 security interest in the proceeds of the Debtor's share from the sale of the baseball.

11 APPROVED AS TO FORM AND CONTENT

12 Dated: Apr 4, 2006

13
14 
15

16 Dennis Davis, Esq.
17 Attorney for Chapter 7 Trustee, E. Lynn Schoenmann

18 **END OF ORDER**
19
20
21
22
23
24
25
26
27
28

ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND OVERRULING TRUSTEE'S OBJECTION TO CLAIM

COURT SERVICE LIST

Attorney for Plaintiff

Mark D. Byrne, Esq.
Law Office of Martin F. Triano
25 Jessie Street
at Ecker Square, 16th Floor
San Francisco, California 94105

Attorney for Defendant

Joel K. Belway, Esq.
Law Offices of Joel K. Belway, P.C.
235 Montgomery St. #668
San Francisco, California 94104

Trustee

E. Lynn Schoenmann, Trustee
800 Powell Street
San Francisco, California 94108

Attorney for the Trustee

Dennis D. Davis, Esq.
Goldberg, Stinnett, Meyers & Davis
44 Montgomery Street, Ste. 2900
San Francisco, California 94104

U.S. Trustee

U.S. Trustee
235 Pine Street, Ste 850
San Francisco, California 94104

Request for Special Notice

Attorney for Y.K.F.

James S. Monroe, Esq.
Nixon Peabody LLP
Two Embarcadero Center, 27th Floor
San Francisco, California 94111-3996

ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND OVERRULING TRUSTEE'S OBJECTION
TO CLAIM

LAW OFFICES
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TELEPHONE (415) 371-8000
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Exhibit G

1
2
3
4
5
6
7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 In re:

No. C-06-2696 MMC

12 ALEXANDER POPOV,

**DECISION AFFIRMING ORDER OF
BANKRUPTCY COURT**

13 Debtor
14 _____

15
16 Before the Court is appellant Trustee E. Lynn Schoenmann's ("Trustee") appeal from
17 the bankruptcy court's order of April 6, 2006, overruling the Trustee's objection to appellee
18 Martin F. Triano's ("Triano") claim against the bankruptcy estate of Alexander Popov
19 ("Popov"). Having reviewed the briefs filed by the parties, the Court rules as follows.

20 **BACKGROUND**

21 **A. Proceedings in State Court**

22 On October 7, 2001, professional baseball player Barry Bonds hit a record-setting
23 home run. The ownership of the baseball was disputed between Popov and Patrick
24 Hayashi ("Hayashi"). On October 12, 2001, Popov and Triano signed an Attorney-Client
25 Fee Contract and Arbitration Agreement ("Fee Contract"), whereby Popov retained Triano
26 to represent him in a civil action against Hayashi. The Fee Contract contains the following
27 lien provision: "Client hereby grants Attorney a lien on any and all claims or causes of
28 action that are the subject of Attorney's representation under this Contract. Attorney's lien

1 will be for any sums due and owing to Attorney at the conclusion of Attorney's services."
2 (Record on Appeal ("ROA") Tab 5, Ex. C at 2.)

3 On October 24, 2001, Triano filed a complaint on behalf of Popov against Hayashi in
4 the Superior Court of California, County of San Francisco, asserting various causes of
5 action and seeking recovery of the baseball. Triano represented Popov in said action until
6 May 14, 2003, after which time Popov represented himself. On June 25, 2003, the
7 baseball was sold at auction for \$450,000; Popov's share was \$225,000.¹

8 After the baseball was sold, Triano filed an action to compel arbitration as to his
9 dispute with Popov over the amount of fees due Triano, and "obtained a preliminary
10 injunction prohibiting Popov from transferring or encumbering the proceeds of the sale until
11 the fee dispute is resolved." See Triano v. Popov, 2005 WL 1230766, *1 (Cal. Ct. App.
12 2005). Additionally, the state court granted Triano's motion to compel arbitration of the
13 parties' fee dispute.

14 **B. Proceedings in Bankruptcy Court**

15 On September 6, 2005, Popov filed a petition for bankruptcy pursuant to Chapter 7
16 of the Bankruptcy Code, (see ROA Tab 8 at 1), thereby automatically staying the court-
17 ordered arbitration as to the fee dispute. On December 2, 2005, Triano filed a claim
18 against the bankruptcy estate, asserting \$777,356.89 as a secured claim. (See ROA Tab
19 8, Ex H at 1.) Of the total amount, Triano alleged that \$473,402.65 constituted attorneys'
20 fees and costs owed in connection with Popov's action against Hayashi, and that such fees
21 and costs were, by reason of the lien provision in the Fee Contract, secured by the
22 proceeds of the baseball sale. (See id. at 4.)

23 On December 9, 2005, the Trustee filed an objection to Triano's claim, (see ROA
24 Tab 1), and, on March 2, 2006, filed a motion for summary judgment in support of the
25 objection, (see ROA Tab 6). In its motion, the Trustee argued that Triano's lien was

26
27 ¹On December 18, 2002, the state court issued a Statement of Decision, finding
28 Popov and Hayashi each had "an equal and undivided interest in the ball," and ordered that
the ball be sold, with the proceeds to be divided equally. See Popov v. Hayashi, 2002 WL
31833731, *8 (Cal. Superior 2002)

1 avoidable on the ground Triano had failed to fully disclose in writing to Popov sufficient
2 information concerning the nature and extent of the lien, and, as such, had violated Rule 3-
3 300 of the California State Bar Rules of Professional Conduct.² In his opposition to the
4 Trustee's motion for summary judgment, Triano argued, *inter alia*, that the Fee Contract
5 complied with the requirements of Rule 3-300. (See ROA Tab 4 at 11-14.)

6 On March 31, 2006, the Bankruptcy Court conducted a hearing, and found that
7 Triano had complied with Rule 3-300(A). (See ROA Tab 22 at 10.) Thereafter, on April 6,
8 2006, the Bankruptcy Court filed an order denying the Trustee's motion for summary
9 judgment, overruling the Trustee's objection to Triano's claim, and finding "Triano has a
10 valid and enforceable security interest in the proceeds of [Popov's] share from the sale of
11 the baseball." (See ROA Tab 18 at 2.)³ On April 7, 2006, the Trustee filed a timely notice
12 of appeal. (See ROA Tab 19.)

13 LEGAL STANDARD

14 A final order of a bankruptcy court is appealable to a district court, see 28 U.S.C.
15 § 158(a)(1); a bankruptcy court's order overruling a trustee's objection to a claim is a final
16 order, see *Siegel v. Federal Home Loan Mortg. Corp.*, 143 F. 3d 525, 529 (9th Cir. 1998)
17 (holding order "allowing or disallowing" claim is "in the nature of a final judgment"). In
18 reviewing a final order of a bankruptcy court, a district court reviews the bankruptcy court's

19 _____
20 ²Rule 3-300 provides as follows:

21 A member shall not . . . knowingly acquire [a] . . . security . . . interest . . .
22 adverse to a client, unless each of the following requirements has been
23 satisfied:

- 24 (A) The transaction or acquisition and its terms are fair and reasonable to the
25 client and are fully disclosed and transmitted in writing to the client in a
26 manner which should reasonably have been understood by the client; and
(B) The client is advised in writing that the client may seek the advice of an
independent lawyer of the client's choice and is given a reasonable
opportunity to seek that advice; and
(C) The client thereafter consents in writing to the terms of the transaction or
the terms of the acquisition.

27 See Cal. Rules of Prof'l Conduct 3-300.

28 ³The Bankruptcy Court, in effect, granted summary judgment sua sponte in favor of
Triano on the Trustee's objection. The Trustee has not challenged such procedure.

1 factual findings for clear error and its conclusions of law de novo. See Diamant v.
2 Kasparian (In re Southern Cal. Plastics, Inc.), 165 F.3d 1243, 1245 (9th Cir. 1999).

3 DISCUSSION

4 Rule 3-300 provides that an attorney may not "acquire an ownership, possessory,
5 security, or other pecuniary interest adverse to a client, unless," inter alia, "the transaction
6 or acquisition and its terms" are "fully disclosed and transmitted in writing to the client in a
7 manner which should reasonably have been understood by the client." See Cal. R. Prof.
8 Conduct 3-300. The California Supreme Court has held that a "charging lien" is "an
9 adverse interest within the meaning of [R]ule 3-300 and thus requires the client's informed
10 written consent." See Fletcher v. Davis, 33 Cal. 4th 61, 69 (2004). Consequently, an
11 attorney seeking to secure payment of hourly fees and costs by obtaining a "charging lien
12 against a client's future judgment or recovery" must comply with the requirements of Rule
13 3-300. See id. at 71. If the attorney has not complied with Rule 3-300, the lien agreement
14 is unenforceable. See id. at 72.⁴

15 As noted, the lien provision here at issue consists of the following language:

16 **LIEN.** Client hereby grants Attorney a lien on any and all claims or
17 causes of action that are the subject of Attorney's representation under
18 this Contract. Attorney's lien will be for any sums due and owing to
19 Attorney at the conclusion of Attorney's services.

20 (See ROA Tab 5, Ex. C at 2.) The Trustee argues such language is deficient, under Rule
21 3-300, for three reasons: (1) Popov was not advised in the lien agreement that if the
22 amount of the lien was later disputed, any recovery Popov obtained on his claims could be
23 delayed pending resolution of such dispute, either by arbitration or litigation; (2) the Fee
24 Contract does not specifically define "lien"; and (3) the lien agreement is "buried" in the Fee
25 Contract.

26 As to the first argument raised by Popov, Fletcher does not address what language

27 ⁴As noted, Popov and Triano entered into the Fee Contract in October 2001, and
28 Triano provided services thereunder until May 2003. Fletcher was decided in June 2004.
Because Triano does not argue the holding in Fletcher is not retroactive, the Court
assumes the holding is retroactive.

1 in a lien agreement would satisfy the full disclosure requirement of Rule 3-300, and neither
2 of the parties has cited, nor has the Court found, any case that directly addresses the
3 issue.⁵ The plain language of the Rule, however, refers to an attorney's having to fully
4 disclose the "transaction or acquisition and its terms." The information that the Trustee
5 argues should have been disclosed is not a "term" of the security interest, but, rather,
6 pertains to how the security interest might, in the future, impact the client. The concerns
7 expressed by the Trustee, specifically, how the lien agreement might impact the client in
8 the future, are addressed by subsection (B) of Rule 3-300, which requires that the attorney
9 advise the client to seek the advice of independent counsel, i.e., one who is not adverse to
10 the client with respect to creation of the charging lien, and that the attorney provide the
11 client a reasonable opportunity to seek such advice. See Rule 3-300(B).⁶

12 With respect to a definition of "lien," the Fee Contract does not, as Popov observes,
13 define such term in a glossary or otherwise. "Lien" is, however, a commonly-used term,
14 and the Trustee cites no authority that common terms must be expressly defined as a
15 predicate to enforceability under Rule 3-300, either as a general matter or under the
16 circumstances presented.⁷

17 Finally, although the Trustee describes the lien agreement as being "buried" in the
18 Fee Contract, the Trustee's characterization is not accurate. The words of the lien
19 provision are included on the second page of a four-page agreement, and are set forth in

20
21 ⁵The lien agreement at issue in Fletcher was oral, see id. at 64, and, consequently,
22 the California Supreme Court had no occasion to consider what specific written language
would comply with the full disclosure requirement set forth in Rule 3-300.

23 ⁶The Trustee did not contend before the Bankruptcy Court, or before this Court, that
Triano failed to comply with section (B) of Rule 3-300.

24 ⁷Indeed, in an agreement Popov entered before executing the Fee Contract, by
25 which Popov borrowed money from his parents to pay for "upcoming legal expenses,"
26 Popov included language granting his parents a "lien" in the baseball: "Security: Borrower
grants Lenders a lien on Barry Bonds 73rd Home Run Baseball as security for any and all
27 money borrowed." (See ROA Tab 12, Ex. A to Ex. H.) Similarly, in another agreement
Popov entered before signing the Fee Agreement, by which Popov borrowed money from a
28 corporation of which he was president, Popov included language granting a "lien," as
follows: "Security: Borrower grants Lender a lien on any proceeds from marketing,
endorsements or sale of the 73rd Home Run Baseball." (See ROA Tab 12, Ex. B to Ex. H.)

1 the same font size as the other provisions. Moreover, it is undisputed that Popov had
2 actual notice of the lien provision before he agreed to enter into the Fee Contract; in
3 particular, Popov discussed the provision with Triano's associate prior to agreeing to
4 execute the Fee Contract. (See ROA Tab 12 ¶ 6.)

5 **CONCLUSION**

6 For the reasons stated, the order of the Bankruptcy Court overruling the Trustee's
7 objection to Triano's claim is hereby AFFIRMED.

8 **IT IS SO ORDERED.**

9
10 Dated: July 3, 2007


MAXINE M. CHESNEY
United States District Judge

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET., 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE: (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit H

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT (this "Agreement") is made by and between E. Lynn Schoenmann, trustee (the "Trustee") of the Chapter 7 bankruptcy estate of Alexander N. Popov, bankruptcy case number 05-32929, and Yugen Kaisha, Y.K.F., a Japanese corporation ("YKF").

WITNESSETH

WHEREAS, on September 6, 2005, Alexander N. Popov (the "Debtor") filed a voluntary petition for relief pursuant to Chapter 7 of the United States Bankruptcy Code (the "Bankruptcy Case") in the United States Bankruptcy Court, Northern District of California, San Francisco Division (the "Bankruptcy Court") and the Trustee was thereafter duly appointed to administer the Debtor's Chapter 7 bankruptcy estate (the "Estate");

WHEREAS, prior to the filing of the Bankruptcy Case, (a) the Debtor was the owner of record of 3,744,000 shares of common stock of Smart Alec's Intelligent Food, Inc., a California corporation, (the "Shares"), and (b) the Debtor purportedly sold all of his right, title, and interest in the Shares to Stephanie Dodson ("Dodson") for \$12,500; and

WHEREAS, the Trustee desires to sell to YKF, and YKF desires to purchase from the Trustee, the Assigned Property (as defined herein);

NOW, THEREFORE, in consideration of the recitals, mutual covenants and conditions contained herein, the parties agree as follows:

1. Definitions. The following capitalized terms shall have the meanings as set forth below:

"Assigned Property" means any and all rights, claims, causes of action and remedies of the Trustee and the Estate, or assertable thereby, to avoid and recover the Debtor's purported transfer of the Shares to Dodson and/or any subsequent transferee thereof as a fraudulent transfer under any applicable law, including, without limitation, Bankruptcy Code §§ 544(b), 548 and 550, and California Civil Code §§ 3439-3439.12, inclusive; and any and all right, title and interest of the Estate in and to the Shares.

"Proceeds" means whatever is recovered, collected, acquired, received, distributed or otherwise obtained on account of or with respect to the Assigned Property.

"Purchase Price" means \$30,000.00.

2. Effective Date. This Agreement shall become effective when (a) each of the parties hereto and their counsel shall have duly executed and delivered this Agreement, and (b) the Bankruptcy Court shall have entered an order approving this Agreement. The first business day on which all of the foregoing conditions have been satisfied shall be referred to herein as the "Effective Date."

3. Bankruptcy Court Approval. The Trustee shall have the obligation to file and serve an appropriate motion requesting Bankruptcy Court approval of this Agreement (the "Approval Order"). The parties shall cooperate as reasonably required in seeking the Approval Order. This Agreement is contingent upon entry of the Approval Order and, in the absence thereof, this Agreement is null and void. In the event an appeal is taken from the Approval Order, (a) YKF shall have the sole and complete responsibility to assume any defense of the appeal and shall bear any and all attorneys' fees, costs, expenses, losses, obligations, liabilities and damages that may be incurred in connection therewith, (b) the Trustee shall have no

obligation to defend such appeal, and (c) this Agreement shall nonetheless become effective and bind the parties as provided in paragraph 2 hereof.

4. Assignment and Purchase. Subject to the terms and conditions of this Agreement, the Trustee hereby agrees to sell, transfer, assign, grant and convey the Assigned Property to YKF, its successors and assigns, YKF agrees to purchase the Assigned Property from the Trustee, and YKF shall be solely entitled to exercise and enforce all rights with respect to the Assigned Property and to collect and receive any and all Proceeds.

5. Payment. In consideration of the sale and assignment of the Assigned Property, YKF shall pay the Purchase Price to the Trustee within 2 business days after the Effective Date in immediately available funds by wire transfer to an account specified in writing by the Trustee.

6. Representations and Warranties of Trustee. The Trustee represents and warrants that it has made no prior assignment of the Assigned Property or of any interest therein and that the Trustee is the sole owner thereof and has good title thereto, free and clear of all liens, claims and encumbrances of any kind and will transfer to YKF such title, free and clear of any liens or encumbrances of any kind.

7. YKF's Acknowledgements. YKF acknowledges to the Trustee that except as expressly set forth in this Agreement, the Trustee does not make, and hereby disclaims any and all, representation or warranties regarding the Assigned Property. YKF acknowledges and agrees that the Assigned Property is acquired by YKF for its own account and risk and that the sale of the Assigned Property to YKF is a sale without recourse against the Trustee and/or the Estate and without obligation of the Trustee and/or the Estate to repurchase the Assigned Property under any circumstances.

8. No Reliance; Independent Investigation. The undersigned agree that each party hereto in entering into this Agreement relies upon its own investigation and judgment in regard to all matters herein contained and that they have not relied on any representations made by the other parties, that this Agreement is made and entered into by each of the parties of its own volition, and each of the parties hereto warrants that this Agreement was made and entered into free of any duress, coercion, or undue influence from any source whatsoever.

9. Merger. It is expressly understood and agreed that this Agreement constitutes the complete and final agreement among the parties regarding the matters herein addressed. Any and all prior negotiations, representations, understandings or agreements, whether written or oral, among the parties, relating to the subject matter of this Agreement and the facts as set forth in the recitals hereto are terminated and shall be of no further force or effect.

10. Amendments. No amendment, modification, termination, or waiver of any provision of this Agreement shall in any event be effective unless the same shall be in writing and signed by all parties hereto.

11. Authority. Each of the parties to this Agreement has full authority and power to enter into this Agreement and this Agreement is the legal, valid and binding obligation thereof.

12. Drafting of Agreement. The undersigned agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to any interpretation of this Agreement.

13. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns.

14. Governing Law. This Agreement shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the State of California applicable to agreements made and to be performed wholly within the State of California, as well as any applicable United States bankruptcy law. The Bankruptcy Court shall retain jurisdiction over any disputes regarding this Agreement or enforcement of this Agreement.

15. Attorneys' Fees. In the event that any legal proceeding, of any kind or nature, is brought by any party concerning the enforcement or interpretation of this Agreement, or any rights and duties hereunder, the prevailing party shall be entitled to recover its attorneys' fees and costs incurred in said proceedings.

16. Counterparts. This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any of the parties hereto may execute this Agreement by signing any such counterparts. Photocopies or facsimiles of executed copies of this Agreement may be treated as originals.

17. Further Assurances. The parties and their counsel shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement.

18. Captions. The captions appearing at the commencement of the paragraphs hereof are descriptive only and for convenience of reference. Should there be any conflict, or apparent conflict, between any such caption and any paragraph at the head of which it appears, the content of the paragraph shall govern the construction of this Agreement.

19. Partial Invalidity. If any provision of this Agreement is found to be invalid by any court, the invalidity of such provision shall not affect the validity of the remaining provisions hereof.

20. Survival of Representations and Warranties. The representations and warranties made by the parties herein shall survive the performance of this Agreement.

21. Notice. Any notice, request, demand, or other communication required or permitted hereunder will be given in writing by first-class mail, postage prepaid, to the party(ies) to be notified. All communications will be deemed given when received. The addresses of the parties for the purposes of such communication are:

Trustee: E. Lynn Schoenmann
c/o Dennis D. Davis, Esq.
Goldberg, Stinnett, Meyers & Davis
44 Montgomery Street, Suite 2900
San Francisco, CA 94104

YKF: Yugen Kaisha, Y.K.F.
c/o James S. Monroe, Esq.
Nixon Peabody LLP
One Embarcadero Center
San Francisco, CA 94111

A party may change his or her address for purposes of notice hereunder only upon written notice to the other party as provided hereinabove.

[Signature Page Follows]

02/20/2003 18:49 9896590320

SCHOENMANN

PAGE 01/01

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be duly executed on the date appearing opposite their names hereinbelow.

Dated: June 1, 2007

E. Lynn Schoenmann, Trustee of the
Chapter 7 Bankruptcy Estate of Alexander
N. Popov

By: [Signature]
E. Lynn Schoenmann

Dated: June 8, 2007

YUGEN KAISHA, Y.K.F.

By: [Signature]
Its: President

APPROVED AS TO FORM AND CONTENT:

Nixon Peabody LLP

Goldberg, Stinnett, Meyers & Davis

By: [Signature]
James S. Monroe, Esq.
Attorneys for Yugen Kaisha, Y.K.F.

By: [Signature]
Dennis D. Davis, Esq.
Attorneys for E. Lynn Schoenmann, Trustee

Entered on Docket
July 31, 2007
GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



GOLDBERG, STINNETT, DAVIS & LINCHEY
A Professional Corporation
DENNIS D. DAVIS, ESQ. CA Bar #070591
44 Montgomery Street, Suite 2900
San Francisco, CA 94104
Telephone: (415) 362-5045
Facsimile: (415) 362-2392
Email: ddavis@gsmdllaw.com

Signed and Filed: July 30, 2007


THOMAS E. CARLSON
U.S. Bankruptcy Judge

Attorneys for E. Lynn Schoenmann, Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER POPOV,

Debtor.

Case No. 05-32929

Chapter 7

**ORDER AUTHORIZING AND APPROVING ASSIGNMENT
OF PERSONAL PROPERTY TO YUGEN KAISHA, Y.K.F.**

Upon the Application for Entry of Order by Default Authorizing Sale of Personal Property to Yugen Kaisha, Y.K.F. for an order authorizing and approving the Trustee's assignment of personal property to Yugen Kaisha, Y.K.F., as more fully set forth in the Notice of Trustee's Assignment of Personal Property to Yugen Kaisha, Y.K.F. filed herein June 26, 2007, and the Declaration of Dennis D. Davis filed in support of said application, submitted, no objections or requests having been filed or served, following date and adequate notice on appropriate parties, and

GOOD CAUSE APPEARING THEREFOR,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Trustee's application is granted in its entirety.
2. On the terms set forth in the notice, this Court hereby authorizes and approves the

-1-

ORDER AUTHORIZING AND APPROVING ASSIGNMENT
OF PERSONAL PROPERTY TO YUGEN KAISHA, Y.K.F.
113282.DOC

1 Trustee's assignment of personal property to Yugen Kaisha, Y.K.F., pursuant to the terms of the
2 Assignment Agreement, a copy of which is attached as Exhibit "B" to the Declaration of Dennis Davis
3 filed in support of the application.

4 3. The Trustee is authorized to take any and all reasonably necessary steps to effectuate the
5 terms of this order.
6
7

8 **END OF ORDER**
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COURT SERVICE LIST

1
2
3
4 Dennis D. Davis, Esq.
5 Goldberg, Stinnett, Meyers & Davis
6 44 Montgomery Street, Suite 2900
7 San Francisco, CA 94104
8

9
10 Office of the U.S. Trustee
11 235 Pine Street, Suite 700
12 San Francisco, CA 94104-3401
13

14
15 E. Lynn Schoenmann
16 800 Powell Street
17 San Francisco, CA 94108
18

19
20 James S. Monroe, Esq.
21 Nixon Peabody LLP
22 Two Embarcadero Center, Suite 2700
23 San Francisco, CA 94111-3996
24
25
26
27
28

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET., 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit I

MARTIN F. TRIANO
MARK D. BYRNE
CAROLYN N. PETTIFER
Attorneys at Law

LAW OFFICES
TRIANO & BYRNE

ALAN H. DAVIDSON (1931-1999)

25 JESSIE STREET, 16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2749

TELEPHONE (415) 371-8000

FACSIMILE (415) 371-8001

www.martinftriano.com
mailbox@martinftriano.com

Our File No.: 1929

July 2, 2007

VIA FACSIMILE AND U.S. MAIL

James Monroe, Esq.
Nixon Peabody, LLP
One Embarcadero Center, 18th Floor
San Francisco, California 94111-3996

Re: *In re Alexander Popov, Debtor*
Chapter 7 Case Number: 05-32929

Dear Mr. Monroe:

I am writing this letter to you with the understanding that you continue to represent YKF, as initially noted in your Request for Special Notice and YKF's Proof of Claim. This letter will follow receipt of a Notice of Trustee's Assignment of Personal Property to Yugen Kaisha, Y.K.F.

According to the Notice provided by Dennis Davis, as Trustee for the above debtor, YKF is purchasing "all of the estate's rights, claims, causes of action and remedies to avoid and recover the debtor's purported transfer of shares of common stock of Smart Alec's Intelligent Food, Inc. to Stephanie Dodson and any subsequent transferee..." The notice further provides that the Trustee is not pursuing the fraudulent transfer action, and is selling the right to such actions to YKF for \$30,000, as a business decision because the shares are subject to a pre-petition lien in favor of YKF.

In light of the foregoing information, I request clarification from YKF in regard to two matters. First, as you know, the Law Offices of Martin Triano also possesses a security interest in the same shares of stock. Conceivably, one of the remedies sought by YKF in "the estate's rights, claims, causes of action and remedies" may include the recovery of the shares of stock in Smart Alec's Intelligent Foods. Notably, the Trustee's Notice does not include any notice that such property is being sold "free and clear of liens." As a result, I am presuming that, in the event that that YKF should acquire the shares, such shares would remain subject to our lien. Please clarify if you agree with this understanding.

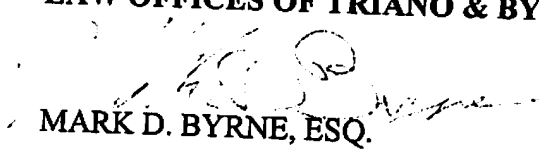
Secondly, I am puzzled in regard to the Trustee's statement that the sale of the shares to YKF represented a business decision because of YKF's pre-bankruptcy filing lien in such stock. According to the testimony of Stephanie Dodson during the objection to discharge proceedings against Mr. Popov, YKF commenced foreclosure proceedings

Letter to James Monroe, Esq.
July 2, 2007
Page 2 of 2

earlier this year which resulted in YKF's lien being paid off in its entirety. Is this correct? Assuming this is correct, in view of YKF no longer possessing any lien on such shares, do you know why the Trustee made the business decision noted above to sell such actions for only \$30,000 to YKF? Moreover, after receiving payment in full for its debt, does YKF continue to have any interest in Smart Alecs? Was YKF obligated to make such purchase as part of an agreement for settlement with Smart Alec's and Stephanie Dodson? Do you intend to pursue a fraudulent transfer action assuming the Bankruptcy Court approves the transfer from the Trustee?

In view of our required deadline to object if necessary to the proposed action, please respond no later than July 6, 2007. If you have any questions, or wish to discuss this matter, please do not hesitate to telephone.

Very truly yours,
LAW OFFICES OF TRIANO & BYRNE


MARK D. BYRNE, ESQ.

Cc: Jonathan Arons, Esq.
Dan Hager, Esq.
Robert Roth, Esq.

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET., 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit

J

Nixon Peabody LLP

Attorneys at Law

One Embarcadero Center
Suite 1800
San Francisco, California 94111-3996
(415) 984-8200

Fax: (415) 984-8300

PRIVILEGE AND CONFIDENTIALITY NOTICE

The information in this fax is intended for the named recipients only. It contains privileged and confidential matter. If you have received this fax in error, please notify us immediately by a collect telephone call to (415) 984-8200 and return the original to the sender by mail. We will reimburse you for postage. Do not disclose the contents to anyone. Thank you.

FAX

| To: | Company: | Fax #: | Telephone #: |
|------------------------|---------------------------------|----------------|----------------|
| 1) Mark D. Bryne, Esq. | Law Offices of Martin F. Triano | (415) 371-8001 | (415) 371-8000 |
| 2) | | | |
| 3) | | | |
| 4) | | | |
| 5) | | | |

INTERNATIONAL PHONE NUMBERS MUST INCLUDE COUNTRY & CITY CODE. SEE LOCAL WHITE PAGES FOR CODES NEEDED.

| | | | |
|--|--------------------|--|--|
| From: James S. Monroe | Date: July 5, 2007 | No. of Pages: 1 (including this page) | |
| Comments: Re: Chapter 7 of Alexander Popov, Case No. 05-32929 In response to your letter of July 2nd: 1. We agree that the proposed sale to YKF has no impact on any lien rights that your firm may have against the shares and does not purport to be "free and clear of liens"; 2. You are correct that YKF's lien has now been paid off. However, as I understand it, the majority of the payoff was funded by a loan from Summit Bank which took a replacement 1 st lien in the shares; 3. YKF has no present interest in Smart Alec's; 4. YKF was not obligated to make the purchase offer to the Trustee; and 5. YKF intends to pursue the fraudulent conveyance action if the sale is approved. | | | |

Original of the transmitted document will be sent by:

☐ First Class Mail ☐ Overnight Mail ☐ Hand Delivery ☐ This transmission will be the only form of delivery of this document

IF YOU DO NOT RECEIVE ALL OF THESE PAGES, PLEASE CONTACT THE FAX ADMINISTRATOR AS SOON AS POSSIBLE AT: (415) 984-8200. THANK YOU.

CONFIRMATION: DATE SENT _____ TIME _____ BY _____

INTEROFFICE TO: ☐ Albany ☐ Boston ☐ Buffalo ☐ Hartford ☐ Long Island ☐ Los Angeles
☐ Manchester ☐ New York City ☐ Northern Virginia ☐ Palm Beach Gardens ☐ Philadelphia ☐ Providence
☐ Rochester ☐ San Francisco ☐ Washington

| To: | Company: | Fax #: | Telephone #: |
|------------------------|---------------------------------|----------------|----------------|
| 1) Mark D. Bryne, Esq. | Law Offices of Martin F. Triano | (415) 371-8001 | (415) 371-8000 |

INTERNATIONAL PHONE NUMBERS MUST INCLUDE COUNTRY & CITY CODE. SEE LOCAL WHITE PAGES FOR CODES NEEDED.

| | | | |
|-----------------------|-----------|--|-------------------------|
| From: James S. Monroe | Date: | No. of Pages: 1 (including this page) | Client/Matter: 031405/6 |
| User #: 4628 | Ext: 8227 | Disbursement Amount: \$ | |

10260136.1

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET., 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit K

Subject: Re: In re Alexander Popov, Debtor

From: "Law Offices of Martin F. Triano" <reception@martinftriano.com>

Date: Tue, 10 Jul 2007 14:21:32 -0700

To: ddavis@gsmdlaw.com

Dear Mr. Davis,

Per the request of Mark D. Byrne, attached please find a copy of his correspondence from July 5, 2007. A hard copy will not follow.

If you have any questions, or have difficulties opening the attachment, please do not hesitate to call this office at (415) 371-8000.

Very truly yours,
LAW OFFICES OF TRIANO & BYRNE

Jose M. Lagniton
Legal Assistant

L-Dennis Davis re adequate protection.rtf **Content-Type:** application/msword
Content-Encoding: base64

MARTIN F. TRIANO
MARK D. BYRNE
CAROLYN N. PETTIFER
Attorneys at Law

LAW OFFICES
TRIANO & BYRNE

ALAN H. DAVIDSON (1931-1999)

25 JESSIE STREET, 16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2749

www.martinftriano.com
mailbox@martinftriano.com

TELEPHONE (415) 371-8000
FACSIMILE (415) 371-8001

Our File No.: 1929

July 5, 2007

VIA E-MAIL AND U.S. MAIL

Dennis Davis, Esq.
Goldberg, Stinnett, Meyers & Davis
44 Montgomery St., Suite 2900
San Francisco, CA 94104

Re: *In re Alexander Popov, Debtor*
Chapter 7 Case Number: 05-32929

Dear Mr. Davis:

This letter will follow our June 27, 2007 telephone conversation and receipt of the proposed agreement subject to court approval between the Trustee and YKF. After reviewing this matter with my client, there are several issues I wish to raise with you, which I suspect may be easily resolved.

First, according to the assignment agreement, the Trustee is assigning various actions/remedies available for a fraudulent transfer under both state and federal law, as well as "any and all right title and interest of the Estate in and to the Shares." The Shares are defined as 3,744,00 shares of common stock of Smart Alec's Intelligent Foods. Furthermore, according to Paragraph 6, the Trustee warrants that, "...the Trustee is the sole owner thereof and has good title thereto, free and clear of all liens, claims and encumbrances of any kind and will transfer to YKF such title free and clear of any liens and encumbrances of any kind." We are greatly troubled by this language in view of the fact that my client has filed a proof of claim evidencing a security arrangement in regard to such shares, which became second in priority to YKF's later lien. Therefore, if necessary, we would seek adequate protection of our lien, based upon the possible impact of the provisions of paragraph 6. Indeed, as you know, adequate protection is mandatory in an 11 USC §363 proceeding upon request by a lienholder.

Nevertheless, because you did not procedurally seek to transfer the shares "free and clear," as required by the local rules, I am presuming that the provisions of paragraph 6 were "boiler plate" and not intended to result in a transfer "free and clear of liens," as a result of the proposed assignment. Please note that I have also confirmed with counsel for YKF that they understand that the shares remain subject to our lien and that they do not understand that the proposed sale would result in the transfer of the shares of stock "free

Letter to Dennis Davis, Esq.
July 5, 2007, Page 2 of 2

and clear" of our lien. As a result, I request that the agreement be modified to reflect that the warranty by the Trustee was not meant to affect the existence/priority of my client's lien upon such shares of stock.

Secondly, I am also confused as to Trustee's rationale for assigning the fraudulent transfer actions and shares of stock for only \$30,000 to YKF. According to the Notice,

"Prepetition, the debtor was involved in the Smart Alec's business, which was subject to a security interest in favor of Yugen Kaisha, Y.K.F. Because of the security interest, the trustee made the business decision that pursuing the fraudulent transfer claims was not in the best interests of the estate."

Based upon testimony of Stephanie Dodson and the representations of counsel for YKF, YKF's lien has now been paid off in its entirety. Moreover, both Ms. Dodson and YKF follow up such statement by noting that Summit Bank now holds a lien, first in priority upon such shares. Therefore, I suspect that your reference to a lien in favor of YKF, as being the basis for seeking only \$30,000, was made in error. Please confirm.

In view of the fact that we must file an objection to the Notice of Assignment within a very short time, I would appreciate a response no later than July 9, 2007. Your courtesy and cooperation are greatly appreciated. If you have any questions, or wish to discuss this matter, please do not hesitate to telephone.

Very truly yours,
LAW OFFICES OF MARTIN F. TRIANO

//S//

MARK D. BYRNE, ESQ.

Cc: Jonathan Arons, Esq.
Dan Hager, Esq.

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET, 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE: (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit L

MARTIN F. TRIANO
MARK D. BYRNE
CAROLYN N. PETTIFER
Attorneys at Law

LAW OFFICES
TRIANO & BYRNE

ALAN H. DAVIDSON (1931-1999)

25 JESSIE STREET, 16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2749

TELEPHONE (415) 371-8000

FACSIMILE (415) 371-8001

www.martinftriano.com
mailbox@martinftriano.com

Our File No.: 1929

July 12, 2007

VIA E-MAIL AND U.S. MAIL

Dennis Davis, Esq.
Goldberg, Stinnett, Meyers & Davis
44 Montgomery St., Suite 2900
San Francisco, CA 94104

Re: *In re Alexander Popov, Debtor*
Chapter 7 Case Number: 05-32929

Dear Mr. Davis:

This letter will follow our July 11, 2007 telephone conversation in regard to the June 26, 2007 Notice of Assignment to YKF concerning the assignment of various actions/remedies available for a fraudulent transfer under both state and federal law, as well as "any and all right title and interest of the Estate in and to the Shares."

Based upon our telephone conversation, this letter will confirm the following:

- The Notice Of Trustee's Assignment Of Personal Property To Yugen Kaisha, Y.K.F. does **not** result in the transfer of the shares of stock in Smart Alecs free and clear of all liens. The Trustee has not followed the necessary procedural requirements to request a court order that the shares are being transferred free and clear of all liens.
- The agreement prepared and executed by YKF is inaccurate when it states that the Trustee is warranting that it is transferring the assets free and clear of liens.
- The Trustee is only able to transfer what it possesses, which may or may be any interest in the shares. To the extent that the Estate does have an interest in such shares, such shares are subject to the security of the Law Offices of Martin F. Triano, as noted in our December 5, 2005 Proof of Claim.
- You have also spoken to James Monroe and requested a copy of his July 5, 2007 facsimile to this office, where he notes his agreement that, "the proposed sale to YKF has no impact on any lien rights that your firm may have against the shares and does not purport to be free and clear of liens."

Letter to Dennis Davis, Esq.
July 12, 2007
Page 2 of 2

Please review the foregoing and advise if it is incorrect in any way. As you know, we must file an objection no later than Monday, July 16, 2007; therefore, I would appreciate a response no later than Friday, July 13, 2007. If you have any questions, or wish to discuss this matter, please do not hesitate to telephone.

Very truly yours,
LAW OFFICES OF MARTIN F. TRIANO


MARK D. BYRNE, ESQ.

cc: Jonathan Arons, Esq.
Dan Hager, Esq.

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET, 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE: (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit M

\$45,648.54

San Francisco, CA

April 17, 2002

For value received Alex Popov promises to pay Martin F. Triano dba Law Offices of Martin F. Triano the principal sum of Forty Five Thousand six hundred forty eight and 54/100 (\$45,648.54)¹, together with such additional sums which may accrue from legal services being provided by the Martin F. Triano dba Law Offices of Martin Triano. All amounts due and owing under this promissory note, together with any credit for payments, shall be reflected in a statement provided to Alex Popov on a monthly basis. The initial principal sum of \$45,648.54 shall accrue interest from May 1, 2002. Any future principal amounts, which will be reflected in the monthly statements, shall accrue interest from the date of the first statement to contain the additional principal charges. All interest on any unpaid principal amount shall accrue at the rate of 10 percent per annum. Alex Popov further agrees to make principal and interest payments in installments of \$ (as required by Martin F. Triano) per month, beginning on May 1, 2002 and continuing on the first of each month thereafter until April 30, 2003, when the entire amount of unpaid principal and interest shall become fully due and payable

This note is secured by the following:

All shares held in Smart Alecs Restaurant

Such security is protected by a UCC-1 Financing Statement.

~~In consideration for this promissory note, Alex Popov, shall exercise his voting privileges in the shares held in Smart Alecs to elect Martin F. Triano to the Board of Directors of Smart Alecs. Alex Popov shall keep Martin F. Triano dba Law Offices of Martin Triano apprised at all times of significant business developments, including but not limited to the status of any negotiations, contractual agreements, or an escrow regarding the possible encumbrance, hypothecation, or other transfer of any property belonging to Smart Alecs Restaurant. Beginning on or about May 10, 2002, and continuing on the 20th day of the month after the end of a quarter thereafter, Alex Popov shall deliver to Martin F. Triano dba Law Offices of Martin F. Triano, financial statements for Smart Alecs Restaurant, with regard to the previous quarter. Such financial statements shall include a balance statement, income statement and expense statement of any business operated by Alex Popov. It is expressly understood that Martin F. Triano will be relying on all information and documents provided by Alex Popov~~

Any encumbrance, hypothecation, or other transfer of the above property being offered as security without the consent of the Martin F. Triano dba Law Offices of Martin F. Triano shall constitute a default under the terms of this note. Any failure to timely provide information and documents required under this note shall constitute a default. Any failure to keep Martin F. Triano dba Law Offices of Martin F. Triano apprised of any significant business developments shall constitute a default. Any failure to make any timely payment of principal and/or interest shall constitute a default.

¹ This amount does not include work in progress between 4/1/02 and 4/17/02

In the event of a default, Martin F. Triano dba Law Offices of Martin F. Triano may pursue all available remedies, including but not limited to foreclose upon the above security under the provisions of the California Commercial Code. In the event that the Law Offices of Martin Triano needs to bring any action to enforce (including foreclosure) or interpret the provisions of this note, the prevailing party shall be entitled to attorney's fees.

This promissory note has been drafted by the Martin F. Triano dba Law Offices of Martin Triano, who has advised Alex Popov that he may seek independent legal advice regarding the terms of this note or any UCC-1 Financing Statement. By his signature below, Alex Popov acknowledges that he has had a reasonable opportunity to seek independent legal advice and is entering this promissory note freely and voluntarily.

Date: 4/17/02

 Alex Popov

Guarantee of Promissory Note

Smart Alecs Restaurant, Inc. guarantees the full performance of Alex Popov under the provisions of the above note. In the event of any default of the provisions of this note, and the pursuit of any remedies under this note, Martin F. Triano dba Law Offices of Martin F. Triano may pursue his remedies against the Alex Popov and/or against the Guarantor (jointly or severally), at the sole election of Martin F. Triano dba Law Offices of Martin F. Triano. Except as otherwise provided below, Martin F. Triano dba Law Offices of Martin F. Triano shall not be required to provide any advance notice to the Guarantor prior to seeking relief under this guarantee, nor shall Martin F. Triano dba Law Offices of Martin F. Triano be required to obtain any judgment against Alex Popov prior to pursuing any remedies against the Guarantor.

~~Smart Alecs Restaurant, Inc. shall keep the Martin F. Triano dba Law Offices of Martin F. Triano apprised of any significant business developments. Beginning on or about May 10, 2002, and continuing on the 20th day of the month after the end of a quarter thereafter, Smart Alecs Restaurant, Inc. shall deliver to Martin F. Triano dba Law Offices of Martin F. Triano, financial statements for Smart Alecs Restaurant, with regard to the previous quarter. Such financial statements shall include a balance statement, income statement and expense statement of any business operated by Smart Alecs Restaurant, Inc. It is expressly understood that Martin F. Triano will be relying on all information and documents provided by Smart Alecs Restaurant.~~

Any encumbrance, hypothecation, or other transfer of the above property being offered as security without the consent of Martin F. Triano dba the Law Offices of Martin F. Triano shall constitute a default under the terms of the above note or this guarantee of such note. Any failure to timely provide information and documents required under this guarantee shall constitute a default. Any failure to keep Martin F. Triano dba Law Offices of Martin F. Triano apprised of any significant business developments shall constitute a default. Any failure by Alex Popov, as

obligor, or Smart Alecs Restaurant Inc., as guarantor, to make any timely payment of principal and/or interest shall constitute a default.

In the event of a default, Martin F. Triano dba Law Offices of Martin F. Triano may pursue all available remedies, including but not limited to foreclose upon the above security under the provisions of the California Commercial Code. In the event that the Law Offices of Martin Triano needs to bring any action to enforce (including foreclosure) or interpret the provisions of this guarantee or the above note, the prevailing party shall be entitled to attorney's fees.

This Guarantee has been drafted by the Law Offices of Martin Triano, who has advised Smart Alecs Restaurant, Inc. that it may seek independent legal advice regarding the terms of this Guarantee or any UCC-1 Financing Statement. By its signature below, Smart Alecs Restaurant, Inc. acknowledges that it has had a reasonable opportunity to seek independent legal advice and is entering this guarantee of the above promissory note freely and voluntarily.

Date:

4/17/02



Alex Popov, President of Smart Alecs Restaurant, Inc.

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET., 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit N

UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)

Martin F. Triano (415)-371-8000

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

Martin F. Triano
Law Offices of Martin F. Triano
25 Jessie Street, 16th Floor
San Francisco, CA 94105

07-71110373

04/20/2007 17:00



SOS

FILED

CALIFORNIA
SECRETARY OF STATE

12376670004 UCC 3 FILING

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1a. INITIAL FINANCING STATEMENT FILE

0213360005

1b. This FINANCING STATEMENT AMENDMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS.



2. TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement.

3. ☒ CONTINUATION: Effectiveness of the Financing Statement identified above with respect to security interest(s) of the Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law.4. ☐ ASSIGNMENT (All or partial): Give name of assignee in item 7a or 7b and address of assignee in item 7c; and also give name of assignor in item 9.5. AMENDMENT (PARTY INFORMATION): This Amendment affects ☐ Debtor or ☒ Secured Party of record. Check only one of these two boxes. Also check one of the following three boxes and provide appropriate information in items 6 and/or 7.
☒ CHANGE name and/or address: Give current record name in item 6a or 6b; also give new name (if name change) in item 7a or 7b and/or new address (if address change) in item 7c. ☐ DELETE name: Give record name to be deleted in item 6a or 6b. ☐ ADD name: Complete item 7a or 7b, and also item 7c; also complete items 7d-7g (if applicable).

6. CURRENT RECORD INFORMATION:

6a. ORGANIZATION'S NAME

OR 6b. INDIVIDUAL'S LAST NAME

Triano

FIRST NAME

Martin

MIDDLE NAME

Francis

SUFFIX

7. CHANGED (NEW) OR ADDED INFORMATION:

7a. ORGANIZATION'S NAME
Law Offices of Martin F. Triano

OR 7b. INDIVIDUAL'S LAST NAME

Triano

FIRST NAME

Martin

MIDDLE NAME

Francis

SUFFIX

7c. MAILING ADDRESS

25 Jessie Street, 16th Floor

CITY

San Francisco

STATE

CA

POSTAL CODE

94105

COUNTRY

US

7d. TAX ID #: SSN OR EIN

ADD'L INFO RE
ORGANIZATION
DEBTOR

7e. TYPE OF ORGANIZATION

7f. JURISDICTION OF ORGANIZATION

7g. ORGANIZATIONAL ID #, if any

☐ NONE

8. AMENDMENT (COLLATERAL CHANGE): check only one box.

Describe collateral ☐ deleted or ☐ added, or give entire ☐ restated collateral description, or describe collateral ☐ assigned.9. NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT (name of assignor, if this is an Assignment). If this is an Amendment authorized by a Debtor which adds collateral or adds the authorizing Debtor, or if this is a Termination authorized by a Debtor, check here ☐ and enter name of DEBTOR authorizing this Amendment.

9a. ORGANIZATION'S NAME

OR 9b. INDIVIDUAL'S LAST NAME

Triano

FIRST NAME

Martin

MIDDLE NAME

Francis

SUFFIX

10. OPTIONAL FILER REFERENCE DATA

UCC FINANCING STATEMENT AMENDMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

11. INITIAL FINANCING STATEMENT FILE # (same as Item 1a on Amendment form)

12. NAME OF PARTY AUTHORIZING THIS AMENDMENT (same as Item 9 on Amendment form)

12a. ORGANIZATION'S NAME

OR

12b. INDIVIDUAL'S LAST NAME

Triano

FIRST NAME

Martin

MIDDLE NAME, SUFFIX

Francis

13. Use this space for additional information

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

The debtor filed Chapter 7 Bankruptcy on September 6, 2005 and was granted a discharge on April 9, 2007. This continuation concerns the secured interest held by the Secured Party of Interest. The original filing statement lists all of the shares of stock in Smart Alec's Intelligent Foods Inc. owned by debtor Alexander Popov. In April of 2004, prior to his filing for bankruptcy, Alexander Popov sold all of his shares of stock in Smart Alec's Intelligent Foods Inc. to Stephanie Dodson. Martin F. Triano continues to hold a lien against the shares sold to Stephanie Dodson.



SECRETARY OF STATE
STATE OF CALIFORNIA

UCC Amendment Acknowledgement

04/20/2007

Page 1 of 1

LAW OFFICES OF TRIANO & BYRNE
25 JESSIE ST., 16TH FLOOR
SAN FRANCISCO CA 94105

Filing Fee: \$20.00
Total Fee: \$20.00

The California Secretary of State's Office has received and filed your document. The information stated below reflects the data that was indexed in our system. Please review the information for accuracy. Included is an image of the filed document to assist you in your review. If you find a potential error, please notify the UCC Section at the number listed below at your earliest convenience.

Amendment Type: Continuation, Amendment File Date: 04/20/2007 File Time: 17:00
Amendment Filing #: 07-71110373
Original Filing Number: 02-13360005 Lapse Date: 05/10/2012

Secured Party(ies):
ORGANIZATION

LAW OFFICES OF MARTIN F. TRIANO
25 JESSIE STREET, 16TH FLOOR SAN FRANCISCO CA
USA 94105

Not all data indexed : This filing included Secured Party information that was either illegible or incomplete.

Filing by the Secretary of State is not conclusive proof that all conditions for securing priority have been met. Ensuring that accurate information is on the document to be filed is the responsibility of the filing party. If this filing is challenged, the Secretary of State does not guarantee that the filing is legally sufficient to secure priority under UCC ARTICLE 9 and expressly disclaims any liability for failure of the filing party to secure priority resulting from the information contained in the filed document, or the lack of information on the filed document.

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET., 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit O

MARTIN F. TRIANO
MARK D. BYRNE
JUDY J. MOON†
EVAN C. KAY
Attorneys at Law

BRUCE W. CARTER
Law Clerk

†Also admitted in New York
and New Jersey

LAW OFFICES
MARTIN F. TRIANO
25TH FLOOR, SHELL BUILDING
100 BUSH STREET

SAN FRANCISCO, CALIFORNIA 94104-3927

TELEPHONE (415) 391-2300

FACSIMILE (415) 391-1922

ALAN H. DAVIDSON (1931-1999)
ELVIRA J. ORLY
ROBERT A. ROTH*
Of Counsel

* Certified Appellate Specialist
State Bar of California
Board of Specialization

Our File No.: 1902

January 27, 2003

VIA FACSIMILE & U.S. MAIL

Alex Popov
2015 Laguna Street, #8
San Francisco, CA 94115

VIA FACSIMILE & U.S. MAIL

Stephanie Dodson
5728 Owens Drive, Apt. #206
Pleasanton, CA 94588

VIA FACSIMILE & U.S. MAIL

Alex Popov, President
Stephanie Dodson, Vice President
Smart Alec's Intelligent Foods
2355 Telegraph Avenue
Berkeley, CA 94704

Re: Promissory Note by Alex Popov and Security thereon

Dear Alex and Stephanie:

Pursuant to Alex's January 24, 2003 request for a copy of the Promissory Note and Guarantee he executed arising out of the Man.Com and Popov vs. Hayashi cases, please find enclosed herewith a true and correct copy of the Promissory Note and Guarantee executed by Alex, as well as the UCC-1 perfecting the security interest in the shares.

Upon review of the Promissory Note and Guarantee, we have realized Alex was required to exercise his voting privileges to elect Marty to the Board of Directors of Smart Alec's restaurant. Based upon our recollection and now review the corporate minute book which we were provided at the commencement of the *YKF* lawsuit, such election never occurred. Moreover, according to the Promissory Note and Guarantee, monthly financial statements were to be sent from Smart Alec's Intelligent Foods, Inc. beginning May 10, 2002; but, never occurred. This letter will confirm that we have never been provided with such financial statements prior to the onset of the *YKF* lawsuit. Subsequent to the commencement of the *YKF* lawsuit, we have received financial statements as required by the Stipulation and Order entered with counsel for *YKF*, for the sole purpose of satisfying the Stipulation and Order only. Therefore, this letter will confirm that this office has not received any financial statements nor obtained a seat upon the Board of Directors of Smart Alec's Restaurants as set forth in the Promissory Note and Guarantee.

Please note that this letter will confirm that Martin F. Triano dba Law Offices of Martin

PRIVILEGED AND CONFIDENTIAL

Letter to Alex Popov, Stephanie Dodson, and Smart Alec's Intelligent Food, Inc.
January 25, 2003, Page 2 of 3

F. Triano has previously and again hereby waives the following provisions of the Promissory Note dated April 17 2002:

"In consideration for this promissory note Alex Popov, shall exercise his voting privileges in the shares held in Smart Alec's to elect Martin F. Triano to the Board of Directors of Smart Alec's. Alex Popov shall keep Martin F. Triano dba Law Offices of Martin Triano apprised at all times of significant business developments, including but not limited to the status of any negotiations, contractual agreements, or an escrow regarding the possible encumbrance, hypothecation, or other transfer of any property belonging to Smart Alec's Restaurant. Beginning on or about May 10, 2002, and continuing on the 20th day of the month after the end of a quarter thereafter, Alex Popov shall deliver to Martin F. Triano dba Law Offices of Martin F. Triano, financial statements for Smart Alec's Restaurant, with regard to the previous quarter. Such financial statements shall include a balance statement, income statement and expense statement of any business operated by Alex Popov. It is expressly understood that Martin F. Triano will be relying on all information and documents provided by Alex Popov." *(Please note that this language has not been redacted in the original and your photocopy.)*

In addition, the Martin F. Triano dba Law Offices of Martin F. Triano has previously and again hereby waives any right to declare a default arising out of the above language.

Furthermore, the law offices of Martin Triano has previously and again waives the provision of the guarantee dated April 7, 2002, and regard to the following language:

"Smart Alec's Restaurant, Inc. shall keep the Martin F. Triano dba Law Offices of Martin F. Triano apprised of any significant business developments. Beginning on or about May 10, 2002, and continuing on the 20th day of the month after the end of a quarter thereafter, Smart Alec's Restaurant, Inc. shall deliver to Martin F. Triano dba Law Offices of Martin F. Triano, financial statements for Smart Alec's Restaurant, with regard to the previous quarter. Such financial statements shall include a balance statement, income statement and expense statement of any business operated by Smart Alec's Restaurant, Inc. It is expressly understood that Martin F. Triano will be relying on all information and documents provided by Smart Alec's Restaurant. *(Please note that this language has not been redacted in the original and your photocopy.)*

In addition, the Martin F. Triano dba Law Offices of Martin F. Triano hereby waives any right to declare a default arising out of the above language.

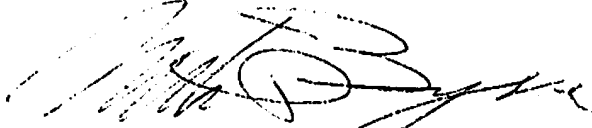
We request that the corporate minute book record minutes of the following: that neither Alex nor Smart Alec's Restaurant exercised its obligations described in the Promissory Note and Guarantee; that Mr. Triano never received any notice of having been elected to the Board of Directors; and that the Martin F. Triano dba Law Offices of Martin F. Triano is forever waving the rights specifically set forth above in the Promissory Note and Guarantee. I have enclosed for your review, some proposed language which may be appropriate for the Board of Directors to address at the next regularly scheduled or special meeting of the Board of Directors.

Letter to Alex Popov, Stephanie Dodson, and Smart Alec's Intelligent Food, Inc.
January 25, 2003, Page 3 of 3

Nevertheless, please note that the Law Offices of Martin Triano still considers the Promissory Note and Guarantee to be fully enforceable with the exception of the language set forth above being waived

If you have any questions or wish to discuss this matter, please do not hesitate to telephone

Very truly yours,
THE LAW OFFICES OF MARTIN F. TRIANO

A handwritten signature in black ink, appearing to read 'Mark D. Byrne', is written over the typed name. The signature is stylized with a large, looped 'M' and a long, sweeping horizontal stroke at the end.

MARK D. BYRNE, ESQ.

RESOLVED:

1. WHEREFORE President Alex Popov, on or about April 17, 2002, executed a Guarantee for Smart Alec's Intelligent Foods, Inc. (aka Smart Alec's Restaurant, Inc.) to guarantee a Promissory Note that was executed by Alex Popov for a personal obligation owing to Martin F. Triano dba Law Offices of Martin F. Triano;
2. WHEREFORE neither Alex Popov nor Smart Alec's Intelligent Foods, Inc. (aka Smart Alec's Restaurant, Inc.) never fulfilled the requirements set forth in the Promissory Note and Guarantee, to wit: the election of Martin F. Triano to the Board of Directors of Smart Alec's Restaurant, Inc. or the delivery of monthly financial statements to Martin F. Triano dba Law Offices of Martin F. Triano starting May 10, 2002;
3. WHEREFORE Martin F. Triano was never otherwise elected or appointed to the Board of Directors of Smart Alec's Restaurant;
4. WHEREFORE Neither Martin F. Triano nor the Law Offices of Martin F. Triano ever received any notice that Mr. Triano was elected to the Board of Directors nor did they ever believe that such election had taken place;
5. WHEREFORE Martin F. Triano never held himself out as, nor ever acted in the capacity of, a director of Smart Alec's Restaurant, Inc.;
6. WHEREFORE Martin F. Triano and / or the Law Offices of Martin F. Triano has never exercised any of their rights as set forth in the Promissory Note and Guarantee, in regard to the election of Martin F. Triano to the Board of Directors of Smart Alec's Restaurant, Inc. or the delivery of monthly financial statements to Martin F. Triano dba Law Offices of Martin F. Triano starting May 10, 2002;
7. WHEREFORE pursuant to the January 25, 2003 correspondence from the Law Offices of Martin F. Triano, Martin F. Triano and / or the Law Offices of Martin F. Triano, now and forever waives all rights provided by the Promissory Note and Guarantee in regard to the election of Martin F. Triano to the Board of Directors of Smart Alec's Restaurant, Inc. and the delivery of monthly financial statements to Martin F. Triano dba Law Offices of Martin F. Triano starting May 10, 2002.
8. WHEREFORE, all other provisions of the Promissory Note and Guarantee remain in effect.

NOW THEREFORE, based upon a vote of the Directors then present, the foregoing is ratified and accepted.

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET., 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit P

JUL 17 2007

MARK D. BYRNE, ESQ., SBN 109268
LAW OFFICES OF MARTIN F. TRIANO
25 Jessie Street, 16th Floor
San Francisco, CA 94105
Telephone: (415) 391-2300
Facsimile: (415) 391-1922

Attorney for Plaintiff Martin F. Triano

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF ALAMEDA

MARTIN F. TRIANO, dba LAW
OFFICES OF MARTIN F. TRIANO

Plaintiff,

v.

STEPHANIE DODSON, SMART
ALEC's INTELLIGENT FOODS INC, a
California Corporation; DOES 1-20

Defendant.

Case Number: RG-07-322877

**MARTIN F. TRIANO'S FIRST
AMENDED COMPLAINT FOR:**

- 1) BREACH OF WRITTEN
CONTRACT
- 2) ACCOUNT STATED
- 3) DECLARATORY RELIEF
- 4) INTENTIONAL
INTERFERENCE WITH
CONTRACTUAL RELATIONS
- 5) REFORMATION

COMES NOW PLAINTIFF MARTIN F. TRIANO (hereinafter "TRIANO") who alleges as follows:

GENERAL ALLEGATIONS

1. MARTIN F. TRIANO (hereinafter "TRIANO") dba THE LAW OFFICES OF MARTIN F. TRIANO (hereinafter "TRIANO") is and at all times mentioned herein a law firm with its principal place of business located in the City and County of San Francisco.

//

1 2. TRIANO is informed and believes and thereon alleges that SMART ALEC'S
2 INTELLIGENT FOOD INC. (hereinafter "SMART ALEC's") is corporation duly organized an
3 existing under the laws of the State of California with its principal place of business located in the
4 City of Berkeley and County of Alameda.

5 3. TRIANO is ignorant of the true names and capacities of Defendants sued herein as
6 DOES 1 through 20, inclusive, and therefore sue these Defendants by such fictitious names.
7 TRIANO will amend this Complaint to allege their true names and capacities when ascertained.
8 TRIANO is informed and believes and thereon alleges that each of the fictitiously-named
9 Defendants are responsible for the occurrences herein alleged, and that TRIANO's damages as
10 herein alleged were proximately caused by such Defendants.

11 4. TRIANO is informed and believes and thereon alleges that STEPHANIE DODSON
12 (herinafter "DODSON") is SMART ALEC's president and sole stockholder.

13 5. TRIANO is informed and believes and thereon alleges that ALEXANDER POPOV
14 (hereinafter "POPOV") was, until April of 2004, the majority shareholder in SMART ALEC's and
15 until February of 2004, acting president of SMART ALEC's.

16 6. TRIANO began representing ALEXANDER POPOV in October of 2001 in the
17 case of Popov v. Hayashi. POPOV hired TRIANO for his case against Hayashi to recover Barry
18 Bonds' 73rd homerun baseball. Thereafter TRIANO represented POPOV in the cases of Bantry
19 Bay v. Popov and Yugen Kaisha (YKF) v. Popov.

20 7. On April 17, 2002, POPOV owed TRIANO \$45,648 for legal services rendered in
21 the case of Popov v. Hayashi.

22 8. On April 17, 2002, POPOV granted TRIANO a written Promissory Note
23 (hereinafter "NOTE") for the \$45,648 he owed together with "such additional sums which may
24 accrue from legal services being provided" by TRIANO. A true and correct copy of the
25 Promissory Note is attached hereto as Exhibit A. POPOV secured his promissory note by pledging
26
27
28

1 his 3,744,000 shares of stock in SMART ALEC's as collateral. On May 10, 2002 TRIANO
2 executed a UCC-1 filing statement with the California Secretary of State. On April 20, 2007, the
3 UCC-1 filing statement was amended and is due to lapse on May 10, 2012. A true and correct copy
4 of the amended UCC-1 filing statement is attached hereto as Exhibit B.

5
6 9. Additionally, on April 17, 2002, POPOV, as acting president of SMART ALEC's,
7 signed and executed a written Guarantee of Promissory Note (hereinafter "GUARANTEE") by
8 SMART ALEC's for the full performance of POPOV under the provisions of the above mentioned
9 promissory note. The agreement was executed by POPOV as the President of Smart Alecs
10 Restaurant, Smart Alecs Intelligent Foods, Inc in error. At all times, the parties to the agreement
11 considered the security to be provided by Smart Alecs Intelligent Foods Inc, which operates a
12 restaurant called Smart Alecs Intelligent Fast Food. See Exhibit A.

13 10. The GUARANTEE executed by SMART ALEC's stated that in the event of
14 default, TRIANO could pursue any claims in connection with POPOV's legal fees against either
15 POPOV or SMART ALEC's either jointly or severally. The note further stated that TRIANO need
16 not obtain a judgment against POPOV in the event of breach in order to recover from SMART
17 ALEC's.

18
19 11. On or about December 18, 2002 the Judge in Popov v. Hayashi ordered the parties
20 to auction off the baseball and split the proceeds. When POPOV retained TRIANO the baseball
21 was expected to sell for over one million dollars. The baseball actually sold for \$450,000, leaving
22 POPOV with \$225,000, an amount far less than he expected. POPOV did not make a single
23 complaint about the legal fees he owed TRIANO until after announcement of the decision.

24 12. TRIANO continued to represent POPOV in the Popov v. Hayashi matter until he
25 was discharged on May 14, 2003. Since TRIANO's discharge, neither POPOV as the obligor of
26 the NOTE, or SMART ALEC's as its guarantor has made the payments as required by the NOTE.
27
28

1 13. TRIANO is informed and believes and thereon alleges that POPOV entered into a
2 settlement agreement with Yugen Kaisha (hereinafter YKF) in February of 2004 whereby SMART
3 ALEC's granted YKF a promissory note for \$772,000 secured by POPOV's shares in SMART
4 ALEC's and POPOV's personal guarantee for the payment of \$280,000.

5
6 14. Unbeknownst to TRIANO and in violation of the NOTE, POPOV in accordance
7 with the settlement agreement with YKF, granted YKF superior lien interest in his 3,744,000
8 shares of stock in SMART ALEC's. As a result of POPOV's breach, TRIANO's lien against the
9 shares of SMART ALEC's was subordinated to YKF's lien and he was unable to foreclose and
10 collect on the full value of those shares.

11 15. In April of 2004 POPOV, without any notice to TRIANO and in violation of the
12 NOTE he granted TRIANO, sold his shares of stock in SMART ALEC's to Stephanie Dodson
13 (hereinafter "DODSON"). A true and correct copy of DODSON's agreement to buy POPOV's
14 shares of stock in SMART ALEC's is hereto attached as Exhibit C.

15 16. On September 6, 2005 POPOV filed a voluntary petition for relief under Chapter 7
16 of the Bankruptcy Code. POPOV was granted a discharge on April 9, 2006. Despite the
17 Bankruptcy Court grant of discharge for POPOV, TRIANO continues to possess an In Rem action
18 against the shares in SMART ALEC's now owned by DODSON, as TRIANO still possesses a
19 secured interest in those shares.

20
21 17. TRIANO was not informed of either YKF's lien against POPOV's shares in
22 SMART ALEC's or DODSON's purchase of those shares until October of 2005.

23 18. Neither POPOV nor SMART ALEC's has made a single payment to TRIANO
24 since January of 2003.

25 19. By the terms of the promissory note, the entire balance, including principal, costs
26 and interest, was due on April 30, 2003.

SECOND CAUSE OF ACTION

(Account Stated as to SMART ALEC's)

28. TRIANO re-alleges and incorporates herein paragraphs 1 to 27 as set forth above.

29. The NOTE signed by POPOV states that as of April 1, 2002 POPOV owed TRIANO \$45,648.54.

30. Starting on May 1, 2002 TRIANO mailed invoices to POPOV, DODSON and SMART ALEC's on a monthly basis. The invoices contained the description of and fee for the legal services provided to POPOV in the previous month. Additionally, the invoices provided to POPOV, DODSON and SMART ALEC's contained a notice of the balance owed to TRIANO for legal services rendered, costs and interest.

31. The following table represents the monthly balance listed on each invoice that was mailed to POPOV, DODSON and SMART ALEC's as well all payments made by POPOV or on POPOV's behalf for legal fees, costs and interest for services rendered from April 17, 2002-May 14, 2003:

| Date Invoice Mailed | Balance | Date Payment Made | Amount of Payment |
|---------------------|--------------|--------------------|-------------------|
| May 1, 2002 | \$31,824.13 | May 22, 2002 | \$28,000 |
| June 1, 2002 | \$20,953.13 | No Payment in June | N/A |
| July 1, 2002 | \$38,748.27 | No Payment in July | N/A |
| August 1, 2002 | \$57,658 | August 15, 2002. | \$1,500 |
| September 1, 2002 | \$91,393.85 | September 1, 2002 | \$16,076.20 |
| October 1, 2002 | \$176,315.21 | October 9, 2002 | \$4,750 |
| November 1, 2002 | \$340,662.98 | November 14, 2002 | \$150 |
| December 1, 2002 | \$416,389.64 | December 6, 2002 | \$720 |
| January 2, 2003 | \$428,070.01 | January 2, 2003 | \$1050 |

| | | | |
|---------------------|--------------|------------------------|-------------------|
| February 1, 2003 | \$439,622.63 | No Payment in February | N/A |
| On March 1, 2003 | \$452,872.16 | No Payment in March | N/A |
| April 1, 2003 | \$463,967.95 | No Payment in April | N/A |
| Date Invoice Mailed | Balance | Date Payment Made | Amount of Payment |
| May 1, 2003 | \$468,355.15 | No Payment in May | N/A |
| June 1, 2003 | \$473,530.32 | No Payment in June | N/A |

32. After receipt of the invoices and an opportunity to review them, Smart Alec's paid the invoices without objection which evidenced the corporation's agreement to discharge its debt to TRIANO. For example, before the Note and Guarantee were executed, Smart Alec's made payments to TRIANO including on February 11, 2002, (Check #4542) in the amount of \$24,860.15 and, on March 14, 2002, (Check #4600) in the amount of \$15,715.22. On the date of execution of the Note and Guarantee, namely April 17, 2002, Smart Alec's made payment (check # 4678) in the amount of \$11,215.65 to TRIANO. After the Note and Guarantee were executed, Smart Alec's made payment to TRIANO on May 21, 2002 (check #4739) in the amount of \$28,000.

33. POPOV continued to receive legal services from TRIANO and incur legal fees until May 14, 2003 when TRIANO was discharged. At no time prior to December 18, 2002 when the judge ruled that POPOV and Hayashi sell the baseball and split the proceeds did POPOV or Smart Alec's object to his legal fees.

34. From July 1, 2003-September 1, 2005 TRIANO continued to mail POPOV, DODSON and SMART ALEC's invoices on a monthly basis. While no new legal fees or costs have been charged since May 14, 2003, the interest on his balance continues to accrue.

35. An account was stated by and between TRIANO and SMART ALEC'S by mutual agreement of the amount owing under the personal Guarantee which is presently in the amount of

1 \$696,629.63, together with interest at 10% per annum on the principal amount from and after April
2 1, 2007.

3 WHEREFORE, Plaintiff prays for Judgment as hereinafter alleged.
4

5 **THIRD CAUSE OF ACTION**

6 **(Declaratory Relief as to DODSON and SMART ALEC's)**

7 36. TRIANO re-alleges and incorporates herein paragraphs 1 to 38 as set forth above.

8 37. On or about April 17, 2002 POPOV granted TRIANO a NOTE for the balance he
9 owed TRIANO for legal services rendered, costs and interest as well as all future legal services
10 performed on behalf of POPOV.

11 38. POPOV's legal fees were secured by all of POPOV's stock in SMART ALEC's
12 and a GUARANTEE by SMART ALEC's. The GUARANTEE was signed by POPOV as the
13 President of SMART ALEC's.

14 39. On or about April 18, 2004, POPOV, in violation of his agreement with TRIANO,
15 sold all of his shares of stock in SMART ALEC's to DODSON.
16

17 40. TRIANO was not made aware of the sale until October of 2005.

18 41. On or about February 22, 2007, during a deposition held at the Law Offices of
19 Martin F. Triano, DODSON testified that she did not believe that TRIANO had a lien against the
20 shares of stock in SMART ALEC's that she purchased from POPOV. She testified that she
21 believes the lien is invalid due to statements made to her by POPOV as well as statements made by
22 the attorneys for YKF during settlement negotiations.

23 42. TRIANO is informed and believes and thereon alleges that DODSON continues to
24 maintain that TRIANO does not hold a valid lien against the shares of stock in SMART ALEC's
25 that she purchased from POPOV.
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43. TRIANO is informed and believes and thereon alleges that DODSON took out a loan to pay off the debt owed by SMART ALEC's to YKF. As a result of the payment, YKF no longer has any interest in the shares of stock in SMART ALEC's.

44. TRIANO is informed and believes and thereon alleges that DODSON used the shares of stock in SMART ALEC's as security for the loan she took out to pay off the debt owed to YKF.

45. TRIANO is informed and believes and thereon alleges that as a result of DODSON's actions, TRIANO's lien against the stock has again been subordinated.

46. TRIANO contends that he still holds a valid lien against DODSON's shares of stock in SMART ALEC's.

47. An actual and present controversy exists between TRIANO, DODSON and SMART ALEC's concerning their respective rights and duties in regard to the NOTE, the GUARANTEE, and the security provided to TRIANO on or about April 17, 2002.

48. TRIANO desires a judicial determination of the respective rights and duties of TRIANO, DODSON and SMART ALEC's as to:

(a) Whether TRIANO possesses a valid security interest on the shares of stock formerly held by POPOV and now held by DODSON.

(b) The ability of DODSON to grant any additional security interests to other parties that render TRIANO's security into an inferior or junior position.

WHEREFORE, Plaintiff prays for Judgment as hereinafter alleged.

FOURTH CAUSE OF ACTION

(Intentional Interference with Contractual Relations as to DODSON Only)

49. TRIANO re-alleges and incorporates herein paragraphs 1 to 51 as set forth above.

50. On or about January 27, 2003, TRIANO faxed and mailed copies of the NOTE and GUARANTEE to DODSON.

1 60. On April 17, 2002, and as described above, in consideration of valuable services,
2 POPOV granted TRIANO a written Promissory Note under which POPOV promised to pay
3 TRIANO the sum of \$45,648.54, together with "such additional sums which may accrue from
4 legal services being provided" by TRAINO.

5
6 61. This Promissory Note was secured by a Guarantee of all shares held in Smart
7 Alec's Restaurant and, was signed by POPOV as acting President of Smart Alec's Restaurant, Inc.

8 62. At the time of preparing the Note and Guarantee, POPOV represented, in error, that
9 the name of the corporation was Smart Alec's Restaurant, Inc.

10 63. As described above, the Guarantee was executed by POPOV as the President of
11 Smart Alec's Restaurant, Inc., instead of Smart Alec's Intelligent Foods, Inc., in error. At all
12 times, the parties to the agreement considered the security to be provided by Smart Alec's
13 Intelligent Foods Inc, rather than Smart Alec's Restaurant, Inc.

14 64. Because of the mutual mistake of the parties, the Guarantee did not reflect the true
15 name of POPOV's corporation. If both parties had not been mistaken at the time of preparing and
16 executing the Guarantee, the corporation would have been correctly named.

17 65. With the exception of the misnomer, the Promissory Note and Guarantee truly
18 expresses the intention of the parties.

19
20 ////

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1 WHEREFORE, Plaintiff TRIANO prays for judgment against DODSON and SMART
2 ALEC's as follows:

3 As to DODSON Only:

4 1. TRIANO desires a judicial determination that:

5 (a) TRIANO possesses a valid security interest on the shares of stock
6 formerly held by POPOV and now held by DODSON;

7 (b) DODSON shall not to grant any additional security interests to other
8 parties that render TRIANO's security into an inferior or junior position;

9 2. For damages in an amount subject to proof;

10 3. For reasonable Attorney's fees incurred in defending and determining TRIANO's
11 rights as to DODSON's shares of stock in SMART ALEC's in an amount subject to proof;.

12 As to SMART ALEC's Only:

13 1. TRIANO desires a judicial determination that:

14 (a) TRIANO possesses a valid security interest on the shares of stock
15 formerly held by POPOV and now held by DODSON;

16 (b) DODSON shall not to grant any additional security interests to other
17 parties that render TRIANO's security into an inferior or junior position;

18 2. TRIANO desires a judicial determination that:

19 (a) the Note and Guarantee be reformed to reflect the mutual intent of the
20 parties at the time of execution, to wit, the document was signed by POPOV
21 for Smart Alec's Intelligent Foods, Inc., instead of Smart Alec's Restaurant,
22 Inc.

23 3. For damages represented by the money owed to TRIANO in an amount subject to
24 proof;

25 4. For reasonable Attorney's fees in an amount subject to proof;

1 As to all Defendants:

- 2 1. For costs of suit incurred herein in an amount subject to proof;
- 3 2. For such other and further relief as the court may deem just and proper.
- 4

5 Dated: 7/13/07

Respectfully submitted,

LAW OFFICES OF MARTIN F. TRIANO

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9 By: 

MARK D. BYRNE, ESQ.

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1 I declare:

2 I am employed in the County of San Francisco, State of California. My business address is
3 25 Jessie Street, 16th Floor, San Francisco, CA 94105. I am over the age of eighteen years, and I am
4 not a party to the within action. On July 13, 2007 I served the following documents:

- 5 • **MARTIN F. TRIANO'S FIRST AMENDED COMPLAINT FOR: 1) BREACH**
6 **OF WRITTEN CONTRACT 2) ACCOUNT STATED 3) DECLARATORY**
7 **RELIEF 4) INTENTIONAL INFEERENCE WITH CONTRACTUAL**
8 **RELATIONS 5) REFORMATION.**

9 Upon the parties listed below, addressed as follows:

10 **Lawrence K. Rockwell, Esq.**
11 **300 Lakeside Drive, Suite 1900**
12 **Oakland, CA 94612-2979**

13 **XXX First Class Mail:** By depositing a sealed envelope in the United States mail at San
14 Francisco, California, with postage fully prepaid.

15 **Facsimile:** By transmitted a true and correct copy via facsimile electronic equipment
16 transmission (fax) to the office(s) of the addressee(s) at the fax number(s) listed above.

17 **Personal Delivery:** By personally delivering the document(s) listed above to the
18 person(s) at the address(es) on the date set forth above.

19 **Overnight:** By placing the document(s) thereof into envelope(s) bearing the name(s)
20 and address(es) of the person(s) to be served by Federal Express delivery.

21 I declare under penalty of perjury under the laws of the State of California that the foregoing
22 is true and correct. Executed on July 13, 2007 at San Francisco, California.

23
24 By: 

25 Jose M. Lagniton
26 Legal Assistant
27
28

LAW OFFICES
TRIANO & BYRNE
25 JESSIE STREET, 16TH FLOOR
SAN FRANCISCO, CA 94105-2749
TELEPHONE: (415) 371-8000
FACSIMILE: (415) 371-8001

Exhibit Q

MARK D. BYRNE, S/B #109268
 LAW OFFICES OF TRIANO & BYRNE
 25 Jessie Street, 16th Floor
 San Francisco, CA 94105
 (415) 371-8000
 (415) 371-8001 fax
 Attorneys for Martin F. Triano

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

| | | |
|-----------------------|---|----------------------------------|
| In re: |) | |
| |) | Case No. 05-32929 |
| ALEXANDER N. POPOV, |) | |
| |) | Chapter 7 |
| Debtor. |) | |
| |) | |
| |) | |
| YUGEN KAISHA, Y.K.F., |) | Adv. Pro. No.: 07-03104 |
| |) | |
| Plaintiff, |) | COMPLAINT FOR |
| |) | DECLARATORY RELIEF IN |
| v. |) | INTERVENTION BY MARTIN F. |
| |) | TRIANO DBA LAW OFFICES OF |
| STEPHANIE DODSON |) | MARTIN F. TRIANO |
| |) | |
| Defendants. |) | |
| |) | |

COMES NOW PLAINTIFF MARTIN F. TRIANO (hereinafter "MFT") who alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
2. This adversary proceeding is brought pursuant to Rule 7001, et seq. of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. §§ 544(b)(1), 548 and 550.

Law Offices
 TRIANO & BYRNE
 25 Jessie Street 16th Floor
 San Francisco, CA 94105
 Tel. 415-371-8000
 Fax 415-371-8001

TRIANO COMPLAINT FOR DECLARATORY RELIEF IN INTERVENTION

4. Venue in this Court is proper pursuant to 28 U.S.C. § 1409 as this intervention is for the adversary proceeding that arises under and in connection with the above-captioned case under 11 U.S.C. § 101, et seq (the “Bankruptcy Code”), which is pending in this District.

5. The adversary proceeding, under which this intervention arises, is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(H).

PARTIES AND BACKGROUND FACTS

PARTIES AND BACKGROUND FACTS

6. On September 6, 2005 (the “Petition Date”) Alexander N. Popov (“Debtor”) filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, commencing the above-captioned bankruptcy (the “Bankruptcy Action”).

7. Thereafter, E. Lynn Schoenmann ("Trustee") became the duly appointed Chapter 7 Trustee to administer the Debtor's bankruptcy estate (the "Estate").

8. On or about August 1, 2007, Yugen Kaisha, Y.K.F. ("YKF") purchased from the Trustee the right to bring the instant adversary proceeding pursuant to the Assignment Agreement and Order entered in the Bankruptcy Action on July 31, 2007.

9. Prior to filing the Bankruptcy Action, Debtor was the owner of record or 3,744,000 shares of common stock (the “Shares”) of Smart Alec’s Intelligent Food, Inc., a California corporation (“Smart Alec’s”).

10. Martin F. Triano dba Law Offices of Martin F. Triano (hereinafter "MFT") is, and at all times mentioned herein was, a law firm with its principal place of business located in the City and County of San Francisco.

11. MFT began representing Debtor in October of 2001 in the case of Popov v. Hayashi. Debtor hired MFT for his case against Hayashi to recover Barry Bonds' 73rd homerun baseball. Thereafter MFT represented POPOV in the cases of Bantry Bay v. Popov and Yugen Kaisha (YKF) v. Popov.

1 12. MFT is informed and believes and thereon alleges that Debtor was, until April of
2 2004, the majority shareholder in Smart Alec's and until February of 2004, the acting president
3 of Smart Alec's.

4 13. On April 17, 2002, Debtor granted to MFT a promissory note ("Note") for the
5 \$45,648 owed by Debtor to MFT together with "such additional sums which may accrue from
6 legal services being provided" by MFT. Debtor secured his promissory note by pledging his
7 3,744,000 Shares of stock in SMART ALEC's as collateral. See Exhibit A. The Note contains a
8 provision for the payment of attorney fees and costs incurred in the enforcement in the Note.

9 14. On April 17, 2002, same day Debtor, as acting president of Smart Alec's, also signed
10 and executed a written Guarantee of Promissory Note by Smart Alec's for the full performance of
11 Debtor under the provisions of the Note ("Guarantee"). See Exhibit A.

12 15. On May 10, 2002 MFT executed a UCC-1 filing statement with the California
13 Secretary of State. On April 20, 2007, the UCC-1 filing statement was amended and is due to
14 lapse on May 10, 2012. A true and correct copy of the amended UCC-1 filing statement is
15 attached hereto as Exhibit B.

16 16. MFT represented Debtor until he was Debtor discharged MFT on May 14, 2003.

17 17. MFT is informed and believes and thereon alleges that defendant Stephanie Dodson,
18 an individual (the "Defendant"), is the spouse of Debtor and resides at 2032 Donald Drive,
19 Moraga, California 94556.

20 18. On or about January 27, 2003, MFT faxed and mailed copies of the Note and
21 Guarantee to Defendant.

22 19. MFT is informed and believes and thereon alleges that Debtor transferred all right,
23 title and interest in the Shares to Defendant pursuant to the Share Purchase Agreement dated
24 April 18, 2004 for the sum of \$12,500 (the "Transfer"), which transfer was in violation of the
25 Note's terms and constituted a default of the Note. See Exhibit C. MFT did not have notice of the
26 Transfer until in or about October, 2005.
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1 20. MFT is informed and believes and thereon alleges that Defendant is Smart Alec's
2 president, and as a result of the Transfer, is Smart Alec's sole stockholder.

3 21. On September 6, 2005 Debtor filed a voluntary petition for relief under Chapter 7 of
4 the Bankruptcy Code ("Bankruptcy Action"). Debtor was granted a discharge on April 9, 2006.
5 Despite the Bankruptcy Court grant of discharge, MFT continues to possess a secured interest in
6 the Shares now owned by Defendant.

7 22. MFT has not received a single payment on the amount set forth in the Note and
8 secured by the Shares since January of 2003. By the terms of the promissory note, the entire
9 balance, including principal, costs and interest, was due on April 30, 2003.

10 23. MFT timely presented a proof of claim in the Bankruptcy Action for his interest in
11 the Shares ("Proof of Claim"), which claim was not objected to by any creditors and was upheld
12 by this court and the district court upon objection and appeal by the Trustee.

13 24. MFT is informed and believes and thereon alleges that Defendant has taken out a
14 loan to pay off the debt owed by Smart Alec's to YKF, which was incurred pursuant to a
15 settlement agreement entered into between Debtor and YKF on or about February 6, 2004. MFT
16 is informed and believes and thereon alleges that as a result of Defendant's actions, MFT's lien
17 against the stock has been subordinated.

18 25. In April 1, 2007 the balance owed to MFT for legal services rendered, costs and
19 interest accrued as a result of MFT's representation of Debtor is \$696,629.63. The balance owed
20 to MFT continues to accrue interest at a rate of 10% per year.

21 26. MFT filed an action in state court on July 13, 2007 for against Smart Alec's and
22 Defendant for determination of his rights pursuant to the Note, which is currently pending before
23 the San Francisco Superior Court and remains in the initial stage of proceedings.

24 27. On or about September 5, 2007, YKF filed the instant action alleging that Debtor and
25 Defendant backdated the Share Purchase Agreement for the Transfer of the Shares and it from
26 August, 2005 to April 18, 2004 with the actual intent to hinder and defraud Debtor's creditors by
27
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1 wrongfully removing the Shares as an asset of the Debtor's Estate shortly before the Petition
2 Date in order to retain control of Smart Alec's.

3 **FIRST CAUSE OF ACTION**

4 **(Declaratory Relief as to DODSON and YKF)**

5 28. MFT re-alleges and incorporates herein paragraphs 1 to 27 as set forth above.

6 29. MFT holds a Note that provides for his secured interest in the Shares and this interest
7 was perfected by MFT. The Note provides for the collection of attorneys fees and costs incurred
8 to enforce the Note.

9 30. MFT is informed and believes and on that basis alleges that Defendant is not a
10 protected purchaser because she had notice of the terms of the Note and of MFT's security
11 interest in the Shares, and she did not receive the Transfer in good faith and did not pay
12 reasonably equivalent value for the Transfer.

13 31. MFT is informed and believes and on that basis alleges that pursuant to California
14 Commercial Code Sections 9312(a) and 9315(a), he holds a valid and perfected security interest
15 in the Shares, and in any proceeds from the Shares.

16 32. On or about February 22, 2007, during a deposition held at the Law Offices of Martin
17 F. Triano, Defendant testified that she did not believe that MFT had a lien against the Shares that
18 she purchased from Debtor. She testified that she believes the lien is invalid due to statements
19 made to her by Debtor as well as statements made by the attorneys for YKF during settlement
20 negotiations. MFT is informed and believes and thereon alleges that Defendant continues to
21 maintain that MFT does not hold a valid lien against the Shares she purchased from Debtor.

22 33. An actual and present controversy exists between MFT and Defendant concerning
23 their respective rights and duties in regard to the Note that granted MFT a security interest in the
24 Shares on or about April 17, 2002.

25 34. MFT is a secured creditor of Debtor's estate pursuant to his Proof of Claim. YKF
26 purchased his right to bring the Adversary Proceeding subject to the interest of secured creditors
27 of Debtor's estate.
28

1 35. YKF has not sought recovery in this Adversary Proceeding for the secured creditors
2 of Debtor's estate. YKF has only requested that the court award relief to YKF personally.

3 36. An actual and present controversy exists between MFT and YKF concerning their
4 respective rights and duties in regard to the right to recover from Debtor's estate, pursuant to
5 YKF's purchase of the right to bring this Adversary Proceeding and MFT's Proof of Claim in the
6 Bankruptcy Action.

7 37. MFT desires a judicial determination, as to respective rights and duties of MFT, YKF
8 and Defendant, such that:

9 (a) MFT possesses a valid security interest on the Shares of stock formerly held by
10 Debtor and now held by Defendant;

11 (b) MFT possesses a valid security interest in the proceeds from the Shares
12 formerly held by Debtor and now held by Defendant;

13 (c) Any recovery by YKF in this action represents proceeds of the Shares and
14 should be paid directly to MFT pursuant to his secured interest in the Shares in an
15 amount according to proof;

16 (d) Attorneys fees and costs incurred herein are collectable under the Note;

17 (e) MFT holds a valid proof of claim in the Debtor's estate; and

18 (f) MFT is entitled to recover in this Adversary Proceeding based upon his Proof
19 of Claim in an amount according to proof.
20

21 WHEREFORE, Plaintiff MFT prays for judgment against Defendant as follows:

22 1. A judicial determination that:

23 (a) MFT possesses a valid security interest on the Shares of stock formerly held by
24 Debtor and now held by Defendant;

25 (b) MFT possesses a valid security interest in the proceeds from the Shares
26 formerly held by Debtor and now held by Defendant;

1 (c) Any recovery by YKF in this action represents proceeds of the Shares and
2 should be paid directly to MFT pursuant to his secured interest in the Shares in an
3 amount according to proof;

4 (d) Attorneys fees and costs incurred herein are collectable under the Note;

5 (e) MFT holds a valid proof of claim in the Debtor's estate; and

6 (f) MFT is entitled to recover in this Adversary Proceeding based upon his Proof
7 of Claim in an amount according to proof.
8

9 2. For the payment of amounts recovered by YKF in this action to MFT pursuant to
10 MFT's Note and Proof of Claim subject in an amount subject to proof;

11 3. For attorneys fees and costs of suit incurred herein in an amount subject to proof; and

12 4. For such other and further relief as the court may deem just and proper.

13 Dated: 11/14/07

LAW OFFICES OF TRIANO & BYRNE

14
15
16 By: 

MARK D. BYRNE

Attorney for Martin F. Triano

dba Law Office of Martin F. Triano
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1 MARK D. BYRNE, ESQ., SBN 109628
2 LAW OFFICES OF TRIANO & BYRNE
3 25 Jessie Street, 16th Floor
4 San Francisco, CA 94105-2749
5 Telephone: (415) 371-8000
6 Facsimile: (415) 371-8001
7 Mailbox@martinftriano.com

8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 In re:

12 ALEXANDER POPOV,
13 Debtor.

)
) Case No. 05-32929

)
) CHAPTER 7

)
) Adv. Proc. No. 07-03104

)
) **PROOF OF SERVICE**

16 YUGEN KAISHA, Y.K.F.,
17 Plaintiff,

18 vs.

19 STEPHANIE DODSON

20 Defendant
21

22 I am citizen of the United States, and a resident of the County of San Francisco; I am over
23 the age of eighteen years, and not a party to the within action. My business address is 25 Jessie
24 Street, 16th Floor, San Francisco, California 94105-2749. On November 15, 2007 I served the
25 following documents:

26 ///

27 ///

- **DECLARATION OF MARK D. BYRNE IN SUPPORT OF MOTION FOR INTERVENTION BY MARTIN F. TRIANO DBA LAW OFFICES OF MARTIN F. TRIANO;**
- **NOTICE OF HEARING ON MOTION FOR INTERVENTION BY MARTIN F. TRIANO DBA LAW OFFICES OF MARTIN F. TRIANO;**
- **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR INTERVENTION BY MARTIN F. TRIANO DBA LAW OFFICES OF MARTIN F. TRIANO;**
- **MOTION FOR INTERVENTION BY MARTIN F. TRIANO DBA LAW OFFICES OF MARTIN F. TRIANO; AND**
- **PROOF OF SERVICE.**

On the parties listed, addressed as follows:

JOEL BELWAY, ESQ.
235 MONTGOMERY STREET, SUITE 668
SAN FRANCISCO, CA 94104-2910

JAMES S. MONROE, ESQ.
NIXON PEABODY LLP,
ONE EMBARCADERO CENTER, 18TH
FLOOR
SAN FRANCISCO, CA 94111

XXX First Class Mail: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service to (List names) the same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more one day after date of deposit for mailing an affidavit.

Facsimile: By transmitting a true and correct copy via facsimile electronic equipment transmission (fax) to (List names) at the fax number listed above.

Personal Delivery: By personally delivering the document(s) above to the person(s) listed above at the address(es) on the date set forth above.

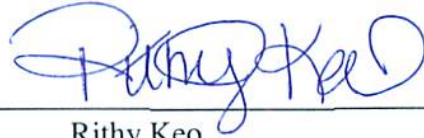
Personal Delivery By Messenger: By consigning the document(s) listed above to a messenger for personal delivery to the following person(s) at the address(es) on the date set forth above.

Overnight: By placing the document(s) thereof into envelope(s) bearing the name(s) and address(es) of the person(s) to be served by Federal Express Delivery.

STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

XXX FEDERAL: I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

1 I declare under penalty of perjury under the laws of the United States of America, that the
2 foregoing is true and correct. Executed on November 15, 2007 in San Francisco, California.

3
4 

5 Rithy Keo
6 Legal Assistant
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JOEL K. BELWAY [60556]
 THE LAW OFFICE OF JOEL K. BELWAY
 Professional Corporation
 235 Montgomery Street, Suite 668
 San Francisco, California 94104
 Telephone: 415-788-1702
 Facsimile: 415-788-1517

Attorney for Defendant
 and Counterclaimant
 STEPHANIE DODSON

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

| | |
|----------------------|---|
| In re: |) Case No. 05-32929 |
| |) |
| ALEXANDER N. POPOV, |) Chapter 7 |
| |) |
| Debtor. |) |
| _____ |) |
| |) A.P. No. 07-03104 |
| YUGEN KAISAH, Y.K.F. |) |
| |) MOTION (1) TO AMEND ANSWER AND |
| |) (2) TO COMPEL PLAINTIFF TO |
| STEPHANIE DODSON, |) FURNISH SECURITY FOR COSTS |
| |) |
| Defendant. |) |
| _____ |) Date: Dec. 21, 2007 |
| |) Time: 9:30 a.m. |
| STEPHANIE DODSON, |) Court: Judge Carlson |
| Counterclaimant, |) |
| vs. |) |
| |) |
| YUGEN KAISAH, Y.K.F. |) |
| |) |
| Claimant. |) |
| _____ |) |

COMES NOW defendant, STEPHANIE DODSON ("Defendant"), and
 upon motion (1) to amend her Answer to add the affirmative
 defenses of lack of capacity and collateral estoppel, and (2) to

1 compel plaintiff, YUGEN KAISHA, Y.K.F. ("Plaintiff"), to furnish
2 security for costs (the "Motion"), respectfully represents as
3 follows:

4 **AMEND ANSWER**

5 1. Defendant has filed an Answer ("Answer") to Plaintiff's
6 Complaint the "Complaint") and a Counterclaim. The Answer alleges
7 affirmative defenses but not collateral estoppel or lack of
8 capacity by Plaintiff, and by this Motion Defendant seeks to add
9 those two defenses.
10

11 **A. Collateral Estoppel.**

12 2. The basis for the collateral estoppel defense, although
13 not yet directly asserted as an affirmative defense, is already
14 alleged in paragraph 9 of the Answer, which states:

15 "9. Defendant denies the allegations of paragraph 9,
16 and alleges that this Court found at trial in Triano v.
17 Popov, A.P. No. 05-3485 (the "Triano Adversary Proceeding")
18 that Debtor transferred his residual interest in the Shares
19 to Defendant on April 18, 2004. The Court's findings in the
20 Triano Adversary Proceeding are incorporated herein by
21 reference."
22

23 3. Defendant wants to assert the Court's finding in
24 the Triano Adversary Proceeding that the contract asserted by
25 Plaintiff to have been a fraudulent conveyance was entered into
26 more than one year before the petition herein. The 2005
27 Bankruptcy Code amendments did not expand the limitations period
28 of Section 548 from one year to two years for cases filed before

1 April 20, 2006. Therefore the date of the contract in question,
2 for the transfer to Defendant of Debtor's residual interest of
3 the Debtor in the shares of stock of Smart Alec's Intelligent
4 Foods, Inc. ("Smart Alec's"), is an essential part of Plaintiff's
5 Section 548 claim and Defendant's defenses thereto.

6 **B. Lack of Capacity.**

7
8 4. As to capacity, Defendant seeks to assert the incapacity
9 of Plaintiff to bring this proceeding because it is not qualified
10 to do business in California, and, potentially, it may not have
11 capacity to sue under Japanese law. As set forth in the
12 Declaration of Joel K. Belway ("Belway Declaration"), the
13 California Secretary of State's online record of corporations
14 does not show Plaintiff's name.

15 5. Plaintiff has sued under Section 548, but also asserts
16 state law claims for fraudulent conveyance. Even if the Section
17 548 claim could stand by itself, and even if Plaintiff's lack of
18 qualification to do business in California did not affect
19 Plaintiff's capacity to sue thereunder, Plaintiff would have to
20 demonstrate capacity to bring its state law claims. Under
21 California law, a foreign corporation not qualified to do
22 business in California may not sue in California courts,
23 Corporations Code Section 2203(c). Defendant submits that rule
24 would also preclude Plaintiff's suing in this Court on state law
25 claims.
26

27 6. Defendant seeks leave to amend her Answer to add the
28 lack of capacity and collateral estoppel defenses under Rule

1 15(a), FRCP, which is incorporated into Bankruptcy Rule 7015.
2 Rule 15 states that leave to amend a pleading "shall be freely
3 given when justice requires." In this case, no prejudice would
4 result from allowing Defendant to amend to add the two additional
5 defendants. There has been one status conference, and the case is
6 not at issue, with Plaintiff having moved to dismiss the
7 Counterclaim. Moreover, Martin Triano ("Triano"), the plaintiff
8 in the Triano Adversary Proceeding, has moved to intervene in
9 this proceeding, and the Court has not yet heard that motion.
10

11 **SECURITY FOR COSTS**

12 7. Defendant also seeks an order that Plaintiff, which
13 alleges that it is a Japanese corporation, furnish security for
14 costs. Specifically, Plaintiff should be required to furnish
15 \$25,000 in security, or such other sum as the Court deems
16 reasonable.

17 8. This Court has the power to require Plaintiff to post
18 security under the federal courts' power to tax costs. *Anderson*
19 *v. Steers, Sullivan, McNamar & Rogers*, 998 F.2d 495, 496 (7th Cir.
20 1993). Federal courts follow the forum state's practice with
21 regard to security for costs. *Simulnet East Assocs. v. Ramada*
22 *Hotel Operating Co.*, 37 F.3d 573, 574 (9th Cir. 1994).
23

24 9. California law provides in CCP Section 1030 that a
25 defendant may file a motion for an order requiring a nonresident
26 or foreign corporation plaintiff to furnish an undertaking for
27 costs and attorney's fees.
28

1 10. Without knowing what discovery will have to be taken and
2 how cooperative Plaintiff will be in bringing witnesses from
3 Japan or North Carolina (where Plaintiff's agent, with whom
4 Defendant was dealing before she paid off the debts to Defendant
5 under the confidential settlement agreement attached as an
6 exhibit to Plaintiff's motion to dismiss the Counterclaim, was or
7 is located), Defendant could face significant costs, beyond her
8 attorney's fees, in defending this proceeding. California CCP
9 Sec. 1033(a)(3) includes deposition transcripts and travel
10 expenses to attend depositions as allowable items of costs.
11 Accordingly, Defendant asks that Plaintiff furnish a \$25,000
12 undertaking.
13

14 Respectfully submitted,

15 Dated: November 27, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

17 /s/ Joel K. Belway
JOEL K. BELWAY
18 Attorney for Stephanie Dodson
19
20
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DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. On November 27, 2007, I served the attached **sMotion (1) to Amend Answer and (2) to Compel Plaintiff to Furnish Security for Costs** on the interested parties in this action by placing true copies thereof in sealed envelopes and transmitting said envelopes to the following addresses by the means indicated:

Via First-Class U.S. Mail

James S. Monroe, Esq.
Gregory E. Schopf, Esq.
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996

U.S. Trustee
235 Pine Street, Suite 850
San Francisco, CA 94104

Mark D. Byrne, Esq.
Triano & Byrne
25 Jessie Street
16th Floor
San Francisco, CA 94105-2749

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 27, 2007, at San Francisco, California.

\s\ Joel K. Belway

1 JOEL K. BELWAY [60556]
2 THE LAW OFFICE OF JOEL K. BELWAY
3 Professional Corporation
235 Montgomery Street, Suite 668
San Francisco, California 94104
Telephone: 415-788-1702
4 Facsimile: 415-788-1517

5 Attorney for Defendant
6 and Counterclaimant
STEPHANIE DODSON

7
8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 In re:) Case No. 05-32929
13)
14 ALEXANDER N. POPOV,) Chapter 7
15 Debtor.)
16)
17) A.P. No. 07-03104
18 YUGEN KAISAH, Y.K.F.)
19) **DECLARATION OF JOEL K. BELWAY RE**
20) **MOTION (1) TO AMEND ANSWER AND**
21 STEPHANIE DODSON,) **(2) TO COMPEL PLAINTIFF TO**
22 Defendant.) **FURNISH SECURITY FOR COSTS**
23)
24) Date: Dec. 21, 2007
25) Time: 9:30 a.m.
26 STEPHANIE DODSON,) Court: Judge Carlson
27 Counterclaimant,)
28 vs.)
29)
30 YUGEN KAISAH, Y.K.F.)
31)
32 Claimant.)
33)

34 I, Joel K. Belway, declare and state as follows:

35 1. I have personal knowledge of the facts set forth in this
36 Declaration and if required I could and would testify competently
37
38

1 thereto. I am the attorney of record for defendant, Stephanie
2 Dodson ("Defendant"), and make this Declaration in support of her
3 motion to amend her Answer to add affirmative defenses of
4 collateral estoppel and lack of capacity and for security for
5 costs (the "Motion").

6 2. The specific language of the affirmative defenses that
7 Defendant seeks to add is the following:

8 **"SIXTH AFFIRMATIVE DEFENSE"**

9
10 Plaintiff's claims under Section 548 of the Bankruptcy
11 Code are barred by the doctrine of collateral estoppel, in
12 that the Court found in the Triano Adversary Proceeding that
13 the Debtor transferred his residual interest in the Shares
14 to Defendant on April 18, 2004.

15 **SEVENTH AFFIRMATIVE DEFENSE**

16 The Complaint is barred by Plaintiff's lack of capacity
17 to bring and maintain this proceeding."

18 3. Today, November 27, 2007, I performed an online search of
19 the "California Business Portal" website of the California
20 Secretary of State, seeking any information on file with the
21 Secretary of State regarding the Plaintiff, Yugen Kaisha, Y.K.F.
22 That search was negative, from which I infer that Plaintiff is
23 not qualified to do business in California.

24 4. I estimate that with expert witnesses, and if depositions
25 must be taken in this proceeding in Japan and North Carolina, the
26 costs herein, including court reporter's fees and travel
27 expenses, could be in the range of \$25,000.
28

1 I declare under penalty of perjury under the laws of the
2 State of California that the foregoing is true and correct.
3 Executed at San Francisco, California on November 27, 2007.

4
5 /s/ Joel K. Belway
6 JOEL K. BELWAY
7
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DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. On November 27, 2007, I served the attached **Declaration of Joel K. Belway re Motion (1) to Amend Answer and (2) to Compel Plaintiff to Furnish Security for Costs** on the interested parties in this action by placing true copies thereof in sealed envelopes and transmitting said envelopes to the following addresses by the means indicated:

Via First-Class U.S. Mail

James S. Monroe, Esq.
Gregory E. Schopf, Esq.
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996

U.S. Trustee
235 Pine Street, Suite 850
San Francisco, CA 94104

Mark D. Byrne, Esq.
Triano & Byrne
25 Jessie Street
16th Floor
San Francisco, CA 94105-2749

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 27, 2007, at San Francisco, California.

\s\ Joel K. Belway

James S. Monroe, Esq. (State Bar Number: 102328)
Gregory E. Schopf (State Bar Number: 122862)
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Facsimile: (415) 984-8300
E-mail: jmonroe@nixonpeabody.com

Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER N. POPOV,

Debtor.

Case No. 05-32929

Chapter 7

YUGEN KAISHA, Y.K.F.,

Plaintiff,

v.

STEPHANIE DODSON,

Defendant.

Adv. Pro. No.: 07-03104

**OPPOSITION OF YUGEN KAISHA, Y.K.F.
TO MOTION FOR INTERVENTION BY
MARTIN F. TRIANO**

Hearing

Date: December 14, 2007
Time: 9:30 a.m.
Place: Courtroom 23
Judge: Hon. Thomas E. Carlson

INTRODUCTION AND STATEMENT OF FACTS

Yugen Kaisha, Y.K.F. ("YKF"), plaintiff in the above-captioned action, hereby submits this opposition to the motion of Martin F. Triano dba Law Offices of Martin F. Triano ("Triano") to file a complaint in intervention in this action pursuant to Rule 7024 of the Federal Rules of Bankruptcy Procedure and Rule 24 of the Federal Rules of Civil Procedure on the grounds that: (1) the bankruptcy court does not have subject matter jurisdiction with respect to Triano's proposed

1 complaint since there is no independent jurisdictional basis for the complaint under §§28 U.S.C.
2 §1334(b) 157(b) and it falls outside the court's supplemental jurisdiction under 28 U.S.C. §1367(a);
3 and, alternatively, (2) even if the court were to have subject matter jurisdiction of Triano's proposed
4 complaint, the requirements for intervention are not met and, accordingly, the motion should be
5 denied.

6 YKF's complaint herein seeks to avoid and recover the debtor's prepetition transfer of
7 3,774,000 shares of common stock (the "Smart Alec's Shares") of Smart Alec's Intelligent Food,
8 Inc., a California corporation ("Smart Alec's") to Dodson as a fraudulent conveyance. YKF has the
9 right to pursue this avoidance action pursuant to an assignment agreement entered into with the
10 Chapter 7 Trustee of the debtor's bankruptcy estate which was authorized and approved by order
11 entered herein on July 31, 2007. YKF maintains that the Smart Alec's Shares were transferred to
12 Dodson shortly before the September 6, 2005 petition date with the actual intent to hinder, delay or
13 defraud the debtor's creditors by removing said shares from the bankruptcy estate and thereby
14 retaining control of Smart Alec's to the exclusion of the debtor's creditors.

15 Triano's proposed complaint in intervention alleges a state law based contract claim related to
16 a prepetition agreement allegedly entered into with the debtor regarding Triano's provision of various
17 legal services to the debtor. As part of the contract, Triano contends that the debtor granted him a
18 security interest for payment of sums due Triano under the fee agreement against certain assets,
19 including the Smart Alec's Shares. Pursuant to his proposed complaint in intervention for declaratory
20 relief against YKF and Dodson (which is in addition to his complaint against Dodson and Smart
21 Alec's concerning this dispute which is presently pending in Alameda County Superior Court),
22 Triano is essentially seeking to liquidate his attorney's fees claim for services allegedly provided to
23 the debtor and establish the validity of his alleged security interest in the Smart Alec's Shares as
24 collateral for the payment thereof. Since the debtor has received a discharge of any personal
25 obligation to pay any amounts owing to Triano under the alleged fee agreement, the relief sought
26 concerns the alleged collateral, not the debtor.

ARGUMENT

A. The Court Does Not Have Subject Matter Jurisdiction With Respect to Triano's Proposed Complaint in Intervention.

Rule 24 of the Federal Rules of Civil Procedure does not alter or displace subject matter jurisdiction requirements. A bankruptcy court has subject matter jurisdiction to adjudicate a complaint in intervention only if there is an independent jurisdictional basis for the counterclaim as provided by 28 U.S.C. §§1334(b) and 157(b) or it falls within the court's supplemental jurisdiction under 28 U.S.C. §1367(a).

Pursuant to 28 U.S.C. §§1334(b) and 157(b), the bankruptcy court has jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." Unlike YKF's complaint which asserts avoidance claims arising under the Bankruptcy Code (11 U.S.C. §§548, 550 & 544(b)), Triano's complaint does not fall within any of these categories since it is based solely upon state law, exists apart from the bankruptcy case, and does not involve or have any conceivable potential impact on the bankruptcy estate. By his complaint, Triano seeks to liquidate his discharged claim for prepetition attorney's fees allegedly owing by the debtor, establish a junior security interest for this claim in the Smart Alec's Shares, and obtain certain relief against Dodson and YKF only. Accordingly, his complaint is not within the statutory grant of bankruptcy jurisdiction.

Since the court does not have an independent basis for federal bankruptcy court jurisdiction with respect to Triano's complaint, permissive intervention under Rule 24(b) is precluded without further analysis. Recent Ninth Circuit cases have reaffirmed that an applicant for permissive intervention must establish an independent basis for jurisdiction. *Northwest Forest Products Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996); *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993), *aff'd*, 64 F.3d 1266 (9th Cir. 1995).

Likewise, Triano's proposed complaint in intervention is not within the bankruptcy court's supplemental jurisdiction under 28 U.S.C. §1367(a) (*See In re Pegasus Gold Corp.*, 394 F.3d 1189 (9th Cir. 2005), which precludes intervention as of right under Rule 24(a)(2). Supplemental jurisdiction extends only to those claims that are "so related to the (plaintiff's) claims...that they form

part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C. §1367(a) (emphasis and parentheses added). This embodies a requirement that all claims arise from a “common nucleus of operative facts.” *In re Pegasus Gold Corp.*, *supra*, at 1195; *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L.Ed. 2d 218 (1966). Applying this requirement here, it is clear that the aggregate of operative facts giving rise to Triano’s complaint (which seeks to liquidate and enforce certain contract rights under a prepetition contract for attorney’s fees) is entirely different from the facts supporting YKF’s complaint (for avoidance of the debtor’s prepetition transfer of his shares of Smart Alec’s to Dodson). YKF’s complaint and Triano’s complaint bear no logical relation to each other and rest upon different documentary, testimonial and other evidence. Under these circumstances, Triano’s complaint is not within the bankruptcy court’s supplemental jurisdiction.

B. Even If The Court Were to Have Subject Matter Jurisdiction of The Proposed Complaint In Intervention, The Requirements For Intervention Under Rule 24 Are Not Met In This Case.

(1) Triano is Not Entitled to Intervene As of Right Pursuant to Rule 24(a)(2)

Intervention of right under Rule 24(a)(2) involves a four-part test, each of which must be satisfied. (*See, Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003)). Triano’s proposed Complaint in Intervention fails to satisfy two of these requirements – that he have a significantly protectable interest in the lawsuit to merit intervention and that the resolution of YKF’s claims will actually affect Triano. *Id.*

As discussed above, YKF’s complaint seeks to avoid and recover the Smart Alec’s shares transferred by the debtor to Dodson as a fraudulent conveyance. By this action, YKF does not seek any relief regarding Triano’s claimed security interest in the shares and any such interest will be unaffected by the fraudulent conveyance action; meaning that whatever enforceable security rights that Triano has with respect to the Smart Alec’s Shares will continue regardless of whether the transfer to Dodson is avoided as a fraudulent conveyance.

Triano posits that he may be inconvenienced if YKF prevails on its complaint and Triano it subsequently becomes necessary for Triano to enforce it alleged security interest directly against

1 YKF. However, this result is highly speculative and does not support intervention. The mere fact that
2 intervention may be convenient for Triano does not establish a right to intervene in YKF's lawsuit.

3 Triano also argues that he may have an interest in any funds that YKF may receive in
4 settlement of the fraudulent conveyance action as proceeds of his alleged collateral. This is clearly
5 incorrect as any such settlement would be attributable to the avoidance action, not to a sale or
6 exchange of the Smart Alec's shares.

7 Since Triano has not and cannot establish any real impairment of a significant right that he
8 will suffer as a result of the fraudulent conveyance action, intervention as of right under Rule 24(a)(2)
9 is unavailable to him.

10 **(2) Permissive Intervention By Triano Under Rule 24(b)(2) Inappropriate**

11 Under Rule 24(b)(2), permissive intervention may be appropriate where the original
12 complaint and the complaint in intervention share common questions of fact and law and where
13 permitting such intervention would not unduly delay or prejudice the original parties. The purpose of
14 the rule is to prevent a multiplicity of suits where common questions of law or fact are involved.
15 *Washington Electric Cooperative, Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 922
16 F.2d 92, 97 (2nd Cir. 1990).

17 Here, as discussed above, there are no significant common questions of law or fact shared by
18 YKF's complaint and Triano's proposed complaint in intervention. In fact, the operative facts giving
19 rise to the respective complaints are entirely different. Under these circumstances alone, the court
20 should deny permissive intervention.

21 However, the Court should also deny intervention by Triano due to the numerous collateral
22 and complex issues that Triano proposes to inject into this litigation which will make the litigation
23 much more expensive and protracted for YKF. The nature of the action would be transformed from a
24 relatively straightforward avoidance action, to one involving what appears to be highly complex and
25 contentious contract and related disputes regarding the nature and amount of attorney's fees that
26 Triano may be entitled to recover. Intervention cannot be used to so radically alter the scope of
27 YKF's suit, causing it delay and prejudice. *Id.*

CONCLUSION

Based upon the foregoing authorities and argument, YKF respectfully requests that Triano's motion for intervention be denied and for such other relief as the court deems appropriate.

Dated: November 30, 2007

NIXON PEABODY LLP

By: /s/ James S. Monroe

James S. Monroe
Attorneys for Yugen Kaisha, Y.K.F.

CERTIFICATE OF SERVICE

CASE NAME: IN RE ALEXANDER N., POPOV, Debtor;
ADV. PROCEEDING: YUGEN KAISHA, Y.K.F. v. STEPHANIE DODSON
COURT: U.S. Bankruptcy Court, Northern District of California
 (San Francisco)
CASE NO.: 05-32929-TC; Adv. Pro. No.: 07-03104-TC
FILE: 031405.000006

I, the undersigned, certify that I am employed in the City and County of San Francisco, California; that I am over the age of eighteen years and not a party to the within action; and that my business address is One Embarcadero Center, Suite 1800, San Francisco, CA 94111-3996. On this date, I served the following document(s):

OPPOSITION OF YUGEN KAISHA, Y.K.F. TO MOTION FOR INTERVENTION BY MARTIN F. TRIANO

on the party stated below, placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

X : By First-Class Mail — I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

____: By Certified Mail Service — I am readily familiar with the firm's practice for collection and processing of correspondence for Certified Mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with Certified Mail postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

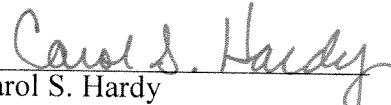
Addressee

Joel K. Belway
 THE LAW OFFICE OF JOEL K. BELWAY
 Professional Corporation
 235 Montgomery Street, Suite 668
 San Francisco, California 94104

United States Trustee
 San Francisco Division
 235 Pine Street, Suite 700
 San Francisco, CA 94104

Mark D. Byrne
 Law Offices of Triano and Byrne
 25 Jessie Street, 16th Floor
 San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 30, 2007, at San Francisco, California.


 Carol S. Hardy

1 JOEL K. BELWAY [60556]
2 THE LAW OFFICE OF JOEL K. BELWAY
3 Professional Corporation
235 Montgomery Street, Suite 668
San Francisco, California 94104
Telephone: 415-788-1702
4 Facsimile: 415-788-1517

5 Attorney for Defendant
6 and Counterclaimant
STEPHANIE DODSON

7
8 **UNITED STATES BANKRUPTCY COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**
11

12 In re:) Case No. 05-32929
13)
14 ALEXANDER N. POPOV,) Chapter 7
15)
Debtor.)
16)
YUGEN KAISAH, Y.K.F.) A.P. No. 07-03104
17) **STATEMENT OF NON-OPPOSITION TO**
18 STEPHANIE DODSON,) **MOTION TO INTERVENE**
19)
Defendant.)
20) Date: Dec. 14, 2007
STEPHANIE DODSON,) Time: 9:30 a.m.
21 Counterclaimant,) Court: Judge Carlson
22 vs.)
23 YUGEN KAISAH, Y.K.F.)
24 Claimant.)
25)

26 Defendant, STEPHANIE DODSON, hereby states her non-
27 opposition to the motion of Martin F. Triano to intervene in this
28 proceeding.

1 Dated: December 1, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

2
3 /s/ Joel K. Belway

JOEL K. BELWAY

4 Attorney for Stephanie Dodson
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DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. On December 1, 2007, I served the attached **Statement of Non-Opposition to Motion to Intervene** on the interested parties in this action by placing true copies thereof in sealed envelopes and transmitting said envelopes to the following addresses by the means indicated:

Via First-Class U.S. Mail

James S. Monroe, Esq.
Gregory E. Schopf, Esq.
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996

U.S. Trustee
235 Pine Street, Suite 850
San Francisco, CA 94104

Mark D. Byrne, Esq.
Triano & Byrne
25 Jessie Street
16th Floor
San Francisco, CA 94105-2749

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 1, 2007, at San Francisco, California.

\s\ Joel K. Belway

MARK D. BYRNE, S/B #109268
LAW OFFICES OF TRIANO & BYRNE
25 Jessie Street, 16th Floor
San Francisco, CA 94105
(415) 371-8000
(415) 371-8001 fax
Attorneys for Martin F. Triano

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

| | | |
|-----------------------|---|--|
| In re: |) | |
| |) | Case No. 05-32929 |
| ALEXANDER N. POPOV, |) | |
| |) | Chapter 7 |
| Debtor. |) | |
| _____ |) | |
| |) | Adv. Pro. No.: 07-03104 |
| YUGEN KAISHA, Y.K.F., |) | |
| |) | REPLY TO YUGEN KAISHA, Y.K.F.'S |
| Plaintiff, |) | OPPOSITION TO MOTION FOR |
| v. |) | INTERVENTION BY MARTIN F. |
| |) | TRIANO DBA LAW OFFICES OF |
| STEPHANIE DODSON |) | MARTIN F. TRIANO |
| |) | |
| Defendant. |) | DATE: DECEMBER 14, 2007 |
| |) | TIME: 9:30 A.M. |
| |) | ROOM.: 23 |
| _____ |) | |

I. INTRODUCTION

Martin F. Triano, dba Law Offices of Martin F. Triano has properly and clearly demonstrated the basis for his intervention in this adversary proceeding, which is to protect his lien and security interest in the shares of stock that Yugen Kaisha, Y.K.F. seeks to recover. Yugen Kaisha, Y.K.F. has mischaracterized the arguments of Martin F. Triano and incorrectly

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TRIANO & BYRNE
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San Francisco, CA 94105
Tel. 415-371-8000
Fax 415-371-8001

1 construed the requirements for intervention. It has presented only sweeping generalizations that
 2 are unsupported by facts and which rely only upon the generally applicable law. Martin F. Triano
 3 however has specifically set forth law and facts supporting his Motion for Intervention and
 4 demonstrating that he should be allowed to intervene.

5 **II. STATEMENT OF FACTS**

6 As previously set forth in the Points & Authorities in Support of the Motion for Intervention
 7 by and its accompanying complaint ("Motion for Intervention"), Martin F. Triano dba Law Offices
 8 of Martin F. Triano ("MFT") seeks relief from this court relating to the adversary proceeding
 9 commenced by Yugen Kaisha, Y.K.F. ("YKF") on September 5, 2007 ("Adversary Proceeding").
 10 Like YKF's complaint in the Adversary Proceeding, MFT's application for intervention is based
 11 upon the ownership of 3,744,000 shares ("Shares") of Smart Alec's Intelligent Foods, Inc. ("Smart
 12 Alec's") by Alexander Popov ("Debtor"), which were transferred to Stephanie Dodson
 13 ("Defendant" or "Dodson") for the sum of \$12,500, pursuant to the Share Purchase Agreement
 14 dated April 18, 2004 ("Transfer").

15 MFT holds a Promissory Note secured by the Shares, which was signed by Debtor on April
 16 17, 2002 for payment of attorneys fees owed by Debtor to MFT, which security interest MFT
 17 subsequently perfected. MFT timely presented a proof of claim secured by the Shares for payment
 18 of attorney's fees ("Proof of Claim"), which was not objected to by any creditors. On or about
 19 August 1, 2007, YKF purchased from the Trustee the right to bring this Adversary Proceeding
 20 against Defendant on behalf of the Debtor's estate. But, that right was taken subject to MFT's
 21 interest as a secured creditor, which limitation was acknowledged by YKF and the Trustee prior to
 22 the completion of the sale. *See* Declaration of Mark D. Byrne in Support of Motion for Intervention,
 23 ¶¶ 13-21, Exhibits I-L.

24 MFT has also filed an action in state court against Smart Alec's and Dodson alleging that
 25 Defendant purchased and subsequently encumbered the Shares without notice to MFT in violation
 26 of the Note. The State Action requests a judicial determination that the Note gives MFT a valid,
 27 enforceable security interest in the Shares and prays for damages against Defendant for Intentional
 28 Interference with Contractual Relations.

III. ARGUMENT

A. MFT Has Demonstrated That His Is Entitled to Intervention of Right in this Action and Permissive Intervention, Because He Holds a Secured Interest In the Shares that Are the Subject of this Action and a Valid Proof of Claim Based on that Security.

MFT is entitled to intervene in the present action pursuant to Rule 7024 of the Federal Rules of Bankruptcy Procedure, and Federal Rules of Civil Procedure, Rule 24 (“Rule 24”), which “traditionally has received a liberal construction in favor of applicants for intervention.” *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (1983).

1. MFT is entitled to intervention of right in this action; he has a significantly protectable interest relating to the property or transaction that is the subject of this action and disposition of this action will impair his interest if he is not allowed to intervene.

The Ninth Circuit has set forth a 4 part test for Intervention of Right pursuant to Rule 24(a)(2): “(1) the applicant’s motion must be timely; (2) the applicant must assert an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that without intervention the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by the other parties.” *See In re Bernal*, 223 B.R. 542, 547 (9th Cir. B.A.P., 1998), *citing Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983). YKF has mistakenly contended, without any supporting authority or facts, that MFT has not met the second and third tests for Intervention. The evidence overwhelmingly demonstrates that these tests have been met.

a. MFT has a significantly protectable interest that is related to this action, because he has a legally protectable interest in the claims at issue.

YKF has unconvincingly argued without any legal support, that because it did not specifically seek relief regarding MFT’s claim, these proceedings will not be affected MFT’s claim. However, there is no requirement that YKF specifically mention MFT’s claim for the claim to be related to and affected by the Adversary Proceeding. Instead, a movant demonstrates that they have a “significantly protectable interest” to justify their intervention in the matter by

1 showing that “the interest is protectable under some law, and that there is a relationship between
 2 the legally protectable interest and the claims at issue. *See Sierra Club v. U.S. Environmental*
 3 *Protection Agency*, 995 F. 2d 1478, 1481 (1993).

4 MFT has shown that his interest in this matter is legally protectable, because MFT has a
 5 secured interest in the Shares and any proceeds therefrom, due to (1) his perfected interest in the
 6 shares established by the Note he holds, and (2) his lien on the shares which was established by
 7 his Proof of Claim in this Bankruptcy Action, **which lien, due to the transfer of the Shares to**
 8 **Dodoson, survives the discharge of Debtor. In fact, as shown in MFT’s Motion for**
 9 **Intervention, YKF did not object to MFT’s Proof of Claim and agreed that its interest in**
 10 **this Adversary Proceeding was taken subject to MFT’s interest as a secured creditor.**
 11 Therefore, because of MFT’s secured interest in the Shares and their proceeds, and MFT’s Proof
 12 of Claim and corresponding lien on the Shares, MFT’s interest is legally protectable. Obviously
 13 MFT’s interest in the Shares and their proceeds is related to this Adversary Proceeding, which is
 14 based upon recovery of the very same Shares and their fair market value at the Transfer.

15 **b. Disposition of this action will impair and impede MFT’s interest in**
 16 **the Shares if he is not allowed to intervene to participate in the record and the**
 17 **remedial scheme in this case, and forced to litigate his claim in another forum.**

18 The third test for intervention of right, which has been met despite YKF’s erroneous
 19 contention to the contrary, is whether the court’s decision in the principle case will result in
 20 *practical* impairment of the intervenor’s interest. *See Yniguez v. State of Arizona*, 939 F.2d 727,
 21 735 (9th Cir. 1991). In the present action, there are two ways in which MFT’s interest can be
 22 practically impaired. First, MFT could be excluded from the remedial scheme in this action and
 23 thus, forced to chase yet another defendant to collect upon the Note he holds. *See U.S. v.*
 24 *Stringfellow*, 783 F.2d 821, 827 (1986) vacated on other grounds, 480 U.S. 370 (1987). (where a
 25 prospective intervenor has demonstrated a clear interest in the remedial scheme, it is reasonable
 26 to conclude that disposition of the litigation may impair the prospective intervenor’s ability to
 27 protect its interests.) Second, a judgment that is adverse to MFT’s interests could be entered by
 28 this court, providing persuasive authority against MFT in any related action. *See Yniguez v. State*

1 of *Arizona*, 939 F.2d 727, 737 (9th Cir. 1991) (intervention is proper where an adverse federal
 2 court decision will substantially weaken the applicants' position, and thereby impair the interest
 3 of the applicants). Accordingly, MFT's ability to protect his interest in the Shares will clearly be
 4 impaired by disposition of the present action, and thus, MFT seeks to intervene to fully
 5 participate in the record upon which he may have to rely, and to participate in formulation of the
 6 applicable remedial scheme in the Adversary Proceeding. *See Sagebrush Rebellion, Inc.*, 713
 7 F.2d at 528; *see also Stringfellow*, 783 F.2d at 827. This impairment is not tempered by his
 8 ability to raise related claims in state court. *See Stringfellow*, 783 F.2d at 827.

9 **c. YKF has not demonstrated any reason MFT should not be allowed to**
 10 **intervene in this action.**

11 YKF has not provided any rational argument or evidentiary support for its sweeping and
 12 mistaken refutation of the impact of the Adversary Proceeding on MFT's interest in the Shares.
 13 Despite In fact, YKF's challenges to MFT's interest in the Shares and their proceeds only serve
 14 to demonstrate that this Adversary Proceeding could practically impair or impede MFT's interest
 15 in the Shares and confirm the importance of MFT's intervention in this matter.

16 YKF's attempt to play both sides of this matter to its advantage is evinced by its
 17 contradictory assertions that (1) MFT's interest in the Shares will continue regardless of the
 18 Adversary Proceeding, (2) the contractual basis for the claim is "highly contentious," and (3)
 19 MFT's ability to recover against YKF is "highly speculative." YKF has continuously played
 20 these same games with MFT by at once insisting that MFT's lien will be preserved and at the
 21 same time offering a fight as to MFT's ability to recover on such lien. There is no reason MFT
 22 should be forced to wait through this entire litigation only to discover who the owner of the
 23 Shares and proceeds are and face yet another litigation in order to collect upon his claim. In fact,
 24 MFT's claim is neither contentious nor speculative, and has been upheld by this court previously,
 25 as evidence by MFT's lien on the Shares pursuant to his Proof of Claim which no creditors,
 26 including YKF, objected to. Also, YKF acknowledged that it took the rights to this Adversary
 27 Proceeding subject to MFT's lien upon the Shares and its current challenge to participate in this
 28 proceeding are unfounded in law or fact.

1 YKF has also misconstrues the law providing for intervention in its argument that MFT's
 2 claim is based in state law and thus is not proper in bankruptcy court. There is no requirement
 3 that the claim be based in Bankruptcy law in order for MFT to intervene in this action. *See In re*
 4 *Bernal*, 223 B.R. at 547. Nevertheless, as discussed above, MFT's interest in the shares is based
 5 upon Note and his lien on the shares created by his Proof of Claim, which lien was not
 6 discharged as the Shares were transferred to Defendant. As such, this claim is based in
 7 bankruptcy law as well as state law.

8 Additionally, YKF has incorrectly drawn an arbitrary line, unsupported by law, in an
 9 attempt to distinguish the relief it seeks in its avoidance action from the sale or exchange of the
 10 Shares. YKF's Adversary Proceeding is based upon the sale and exchange of the Shares, and
 11 YKF specifically seeks recovery of the fair market value of that sale or exchange of the Shares.
 12 YKF has offered no reason to designate the "action" from its purpose, recovering the value of the
 13 sale or exchange of the Shares. In fact, this very argument by YKF demonstrates the importance
 14 of allowing MFT to intervene to determine his rights to the Shares and to any recovery by YKF
 15 that may be proceeds from the Shares. If MFT is not allowed to intervene, he will be forced to
 16 track down the illusive proceeds, which are easily disposable, from yet another defendant.

17 Finally, YKF has mistakenly argued that determination of MFT's rights will necessitate a
 18 liquidation of his claim, which will delay this Adversary Proceeding and prejudice YKF. First,
 19 the lien created by the Proof of Claim establishes MFT's claim to the Shares, and thus provides
 20 for the value of that claim. *See Siegel v. Federal Home Loan Mortgage Corporation*, 143 F.3d
 21 525 (9th Cir. 1998) (under 11 U.S.C. § 502(a) any party in interest can raise objections and
 22 litigate them if they see something wrong with a Proof of Claim, but if they do not the claim has
 23 been determined on the merits and attacks upon it that could have been asserted cannot be raised
 24 in later proceedings); *see also Nathanson v. Hecker*, 99 Cal. App. 4th 1158, 1162 (2002) (a
 25 bankruptcy court's allowance of a claim is a final judgment and binding and conclusive on all
 26 parties and their privies); *see also* 11 U.S.C. § 502(a) (a claim that is not objected to is deemed to
 27 be allowed). Second, MFT seeks to intervene to establish, pursuant to any transfer to YKF, his
 28 rights to the Shares and to any proceeds of the Shares. If the Shares or their proceeds are awarded

1 to YKF, and it is determined that MFT has rights to these Shares and their proceeds, then
 2 determination of the amount of MFT's secured will be inevitable, as the time for default on the
 3 Note has long passed. MFT's ability to participate in the remedial scheme is supported by law,
 4 and there is no reason that such participation would delay or prejudice YKF's recovery if it is
 5 first determined that MFT has an interest in such recovery. In fact, this would avoid taking the
 6 matter to a new forum and creating a new record in order to enforce MFT's interest against YKF,
 7 which would cause delay in resolution of this matter and require additional costs for all parties.

8 **2. MFT's request for intervention is supported by case law that allows**
 9 **intervention for attorney's fees claims based upon the principles of equity and judicial**
 10 **economy.**

11 "Rule 24(b) necessarily vests 'discretion in the district court to determine the fairest and
 12 most efficient method of handling a case *See Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir.
 13 1989). In *Venegas*, a discharged attorney sought to intervene in order to recover his fees. The
 14 court held that it was an abuse of discretion for the trial court to have not allowed permissive
 15 intervention, where judicial economy, equity and the related interests of claims clearly weighed
 16 in favor of such intervention. *See Venegas*, 867 F.2d at 530. The *Venegas* court determined that
 17 if it mandated litigation of the attorney's claim in state court "[t]he parties would be required to
 18 make a record that would consist of **facts and arguments that are already before this court,**"
 19 and additionally, "the parties would be forced to litigate before a judge who lacks **the long**
 20 **experience with this case**, and with these parties, that this court has had." (emphasis added) *See*
 21 *Venegas*, 867 F.2d at 531, (quoting *Wood v. Motorola, Inc.*, 587 F. Supp. 531, 532-33 (D.Haw.
 22 1984.)) As in *Venegas*, this court is "well acquainted with the underlying litigation and the
 23 parties" to MFT's claim, and "no novel or difficult issues of state law" requiring a state court
 24 decision are raised in MFT's claim. *See Venegas*, 867 F.2d at 531. This Adversary Proceeding is
 25 only a small part of the Bankruptcy Action, and during the course of the Debtor's Bankruptcy,
 26 this court has already determined the validity of MFT's interest in the Shares and the value of
 27 that interest in the course of upholding MFT's secured Proof of Claim in this matter, which has
 28 now become a lien on the Shares, which MFT hereby seeks to enforce.

YKF has argued without support that MFT seeks to inject numerous collateral and complex issues, and that these issues are not related by law or fact. Yet, clearly MFT has alleged an interest in the Shares that are the sole subject of this proceeding, and that is clearly a significant related issue of fact. Additionally, MFT seeks to participate in the remedy of this Adversary Proceeding, including the determination of ownership of the Shares and the proceeds of those Shares, which is a significantly related issue of law and fact. Finally, the issues raised by MFT regarding his interest in the Shares are not complex issues of state law as the *Venegas* court has held, and involve concrete evidence including a lien that was created by the Proof of Claim in this Bankruptcy Matter. Therefore, based upon the interests of equity and judicial economy formulated in *Venegas*, MFT should be permitted to intervene in the present action, pursuant to Rule 24(b)(2).

3. MFT has shown independent grounds for jurisdiction for permissive intervention.

A court may grant permissive intervention pursuant to Rule 24(b)(2) “if three conditions are met: (1) the movant must show an independent grounds for jurisdiction; (2) the motion must be timely; and (3) the movant’s claim or defense and the main action must have a question of law and fact in common.” *See Venegas*, 867 F.2d at 529. As discussed above, MFT’s claim is based upon a timely application, his related interest in the Shares as discussed above, and his Proof of Claim that was upheld in the Bankruptcy Action.

MFT’s Application is based upon the Proof of Claim that he submitted during the Bankruptcy Action from which this Adversary Proceeding stems. YKF has not addressed this argument and has merely made a sweeping and incorrect contention that independent grounds are not available. However, MFT has shown that his Motion for Intervention is based upon the Proof of Claim he holds, which provides him with a lien upon the shares that cannot be discharged and which corresponds to the Note he holds that is secured by the Shares that are the subject of this Adversary Proceeding. No creditors, including YKF, objected to MFT’s Proof of Claim, and this court and the district court affirmed MFT’s Proof of Claim upon objection and appeal by the Trustee. Additionally, YKF agreed prior to purchasing its right to pursue this fraudulent conveyance claim, that it was buying the action from the Trustee subject to the MFT’s

1 claim as a secured creditor of Debtor's estate. Thus, based upon his valid Proof of Claim, MFT
2 has independent grounds for jurisdiction by this court, and MFT has provided sufficient evidence
3 to show that he is entitled to permissive intervention in this matter. *See Venegas*, 867 F.2d at 529.

4 **IV. CONCLUSION**

5 MFT has demonstrated that he is entitled to intervene in this Adversary Proceeding under
6 both theories of Intervention of Right and Permissive Intervention. MFT's application for
7 intervention is supported by substantial case authority that provides controlling authority in favor
8 of MFT's intervention. It is therefore clear the MFT has satisfied the requirements for
9 intervention, especially since Rule 24 has "traditionally has received a liberal construction in
10 favor of applicants for intervention." *See Sagebrush Rebellion, Inc.*, 713 F.2d at 527.

11 Accordingly, MFT's application for intervention should be granted.

12
13 Respectfully Submitted,

14 Mark D. Byrne, Esq.
15 Law Offices of Triano & Byrne
16 25 Jessie Street, 16th Floor
San Francisco, CA 94105

17 Dated: December 6, 2007

18 /s/ Mark D. Byrne

19 MARK D. BYRNE
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER POPOV,
Debtor.

Case No. 05-32929

CHAPTER 7

Adv. Proc. No. 07-03104

CERTIFICATE OF SERVICE

YUGEN KAISHA, Y.K.F.,

Plaintiff,

vs.

STEPHANIE DODSON

Defendant

I am citizen of the United States, and a resident of the County of San Francisco; I am over the age of eighteen years, and not a party to the within action. My business address is 25 Jessie Street, 16th Floor, San Francisco, California 94105-2749. On December 7, 2007 I served the following documents:

///

///

- 1 • **REPLY TO YUGEN KAISHA, Y.K.F.'S OPPOSITION TO MOTION FOR**
- 2 **INTERVENTION BY MARTIN F. TRIANO DBA LAW OFFICES OF MARTIN**
- 3 **F. TRIANO; AND**
- 4 • **PROOF OF SERVICE.**

On the parties listed, addressed as follows:

5 JOEL BELWAY, ESQ.
6 235 MONTGOMERY STREET, SUITE 668
7 SAN FRANCISCO, CA 94104-2910

JAMES S. MONROE, ESQ.
NIXON PEABODY LLP,
ONE EMBARCADERO CENTER, 18TH
FLOOR
SAN FRANCISCO, CA 94111

9 **First Class Mail:** I am "readily familiar" with the firm's practice of collection and
10 **XXX** processing correspondence for mailing. Under that practice it would be deposited with
11 the U.S. postal service to **JOEL BELWAY, ESQ.** and **JAMES S. MONROE, ESQ.**
12 the same day with postage thereon fully prepaid at San Francisco, California in the
13 ordinary course of business. I am aware that on motion of the party served, service is
14 presumed invalid if postal cancellation date or postage meter date is more one day after
15 date of deposit for mailing an affidavit.

16 **Facsimile:** By transmitting a true and correct copy via facsimile electronic equipment
17 transmission (fax) to (List names) at the fax number listed above.

18 **Personal Delivery:** By personally delivering the document(s) above to the person(s)
19 listed above at the address(es) on the date set forth above.

20 **Personal Delivery By Messenger:** By consigning the document(s) listed above to a
21 messenger for personal delivery to the following person(s) at the address(es) on the date
22 set forth above.

23 **Overnight:** By placing the document(s) thereof into envelope(s) bearing the name(s)
24 and address(es) of the person(s) to be served by Federal Express Delivery.

25 **STATE:** I declare under penalty of perjury under the laws of the State of California that
26 the foregoing is true and correct.

27 **XXX FEDERAL:** I declare that I am employed in the office of a member of the bar of this
28 Court at whose direction the service was made. I declare under penalty of perjury under
the laws of the United States of America that the foregoing is true and correct.

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1 I declare under penalty of perjury under the laws of the United States of America, that the
2 foregoing is true and correct. Executed on December 7, 2007 in San Francisco, California.

3
4 Respectfully Submitted,

Rithy Keo
Law Offices of Triano & Byrne
25 Jessie Street, 16th Floor
San Francisco, CA 94105

7 Dated: December 7, 2007

8
9 _____/s/
RITHY KEO

JOEL K. BELWAY [60556]
 THE LAW OFFICE OF JOEL K. BELWAY
 Professional Corporation
 235 Montgomery Street, Suite 668
 San Francisco, California 94104
 Telephone: 415-788-1702
 Facsimile: 415-788-1517

Attorney for Defendant
 and Counterclaimant
 STEPHANIE DODSON

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

| | |
|---------------------------------|---|
| In re: |) Case No. 05-32929 |
| |) |
| ALEXANDER N. POPOV, |) Chapter 7 |
| |) |
| Debtor. |) |
| _____ |) |
| |) A.P. No. 07-03104 |
| YUGEN KAISHA, Y.K.F., Plaintiff |) |
| |) MEMORANDUM IN OPPOSITION TO |
| v. |) MOTION TO DISMISS COUNTERCLAIM |
| STEPHANIE DODSON, |) |
| |) |
| Defendant. |) |
| _____ |) Date: Dec. 21, 2007 |
| |) Time: 9:30 a.m. |
| STEPHANIE DODSON, |) Court: Judge Carlson |
| Counterclaimant, |) |
| vs. |) |
| |) |
| YUGEN KAISHA, Y.K.F. |) |
| |) |
| Counterdefendant.) |) |
| _____ |) |

Defendant and counterclaimant, STEPHANIE DODSON ("Dodson"),
 submits this Memorandum in opposition to the motion of
 counterdefendant, YUGEN KAISHA, Y.K.F. ("YKF"), to dismiss

1 Dodson's counterclaim (the "Counterclaim") against YKF (the "YKF
2 Motion").

3 **I. Introduction.**

4 YKF has sued Dodson in its complaint herein (the
5 "Complaint") for an alleged fraudulent transfer to Dodson by
6 debtor, Alexander Popov ("Debtor"), of Debtor's interest in
7 certain shares of corporate stock of Smart Alec's Intelligent
8 Foods, Inc., a California corporation ("Smart Alec's"). As she
9 testified at the trial in this Court in an objection to discharge
10 proceeding, *Triano v. Popov*, A.P. No. 05-3485 (the "Triano AP"),
11 Dodson purchased, under a share purchase agreement dated April
12 18, 2004 (the "Share Purchase Agreement"), for a price of
13 \$12,500, Debtor's residual interest in 3,744,000 Smart Alec's
14 shares (the "Shares"), which were, as of April 2004, pledged to
15 YKF as security for hundreds of thousands of dollars of
16 indebtedness.
17

18 The Share Purchase Agreement is attached as Exhibit 3 to the
19 Complaint. Exhibit 1 to the YKF Motion is a copy of the
20 confidential settlement agreement and release among YKF, Smart
21 Alec's, Debtor and Dodson dated February 6, 2004 (the "Settlement
22 Agreement"); at page 2, paragraph 2.b, of that agreement, Debtor
23 agreed to pledge the Shares to YKF. Thus, at the time of the
24 transfer that is the subject of its Complaint, which YKF alleges
25 was intended to hinder, delay or defraud creditors, YKF had
26 physical possession of the Shares.
27
28

1 Martin F. Triano ("Triano"), the plaintiff in the Triano AP,
2 has now sued Dodson (and Smart Alec's) in the Alameda County
3 Superior Court, in *Triano v. Dodson, et al.*, No. RG-07-322877
4 (the "Alameda SCT Action"), alleging that he, Triano, has a first
5 lien on the Shares. Triano has also filed a motion to intervene
6 in this proceeding (the "Intervention Motion"), contending that
7 because ownership of the Shares is being litigated herein, he has
8 an interest, as a lien claimant, in protecting himself.

9
10 While Dodson disputes all claims against her (and against
11 Smart Alec's and the Chapter 7 estate) by Triano, she agrees that
12 intervention herein by Triano is appropriate and necessary, so
13 that her interests, too, can be determined in a single forum at a
14 single time. As she testified at the Triano AP trial, Dodson
15 caused the Shares to be redeemed from the pledge to YKF, which
16 also had a UCC-1 lien on the assets of Smart Alec's, borrowing
17 thousands of dollars from Summit Bank to redeem the Shares and to
18 acquire YKF's own shares in Smart Alec's. Whoever has a claim to
19 the Shares or a lien thereon should once and for all be decided.

20 **II. Argument.**

21 **A. The Complaint.**

22
23 The Complaint alleges that the transfer to Dodson by Debtor
24 under the Share Purchase Agreement was intended to hinder, delay
25 or defraud creditors or, alternatively, was constructively
26 fraudulent (the "Transfer"). The Transfer was of Debtor's
27 residual interest in the Shares, and the Share Purchase Agreement
28 explicitly refers to the pledge of the Shares to YKF and recites

1 the \$775,000 of indebtedness that had to be repaid to YKF to free
2 the Shares from YKF's possessory lien.

3 **B. The Counterclaim.**

4 The Counterclaim alleges that, in delaying Dodson's final
5 payoff of the balance of indebtedness to YKF (the same \$775,000
6 indebtedness, secured by the Shares and assets of Smart Alec's,
7 that is the subject of the Settlement Agreement), YKF extracted
8 from Dodson the sum of approximately \$90,000 in increased fees
9 and charges by delaying, in bad faith, the payoff.
10

11 Demonstrating, through the legal and business maneuver that
12 led to this proceeding, that avarice made it into the 21st
13 Century, YKF, after its final extraction from Dodson under the
14 Settlement Agreement, came to the Trustee herein and acquired,
15 for \$30,000, the estate's avoidance rights. YKF then sued Dodson,
16 saying, in effect, that, after receiving \$775,000 plus interest
17 and attorney's fees plus the approximately \$90,000 that is the
18 subject of the Counterclaim, "We want more."
19

20 **C. The nexus between the Complaint and Counterclaim.**

21 Ownership and transfer of the corporate shares of Smart
22 Alec's provide the factual and legal nexus among the Claim, the
23 Counterclaim and the Intervention Motion. The Transfer,
24 challenged by YKF in the Complaint, followed the pledge of the
25 shares to YKF by Debtor, and preceded the redemption of the
26 Shares and YKF's owns shares in Smart Alec's, in the course of
27 which YKF's bad faith foot-dragging took place, giving rise to
28

1 the Counterclaim. By denying the YKF Motion and granting the
2 Intervention Motion, at the end of the day, the judge and jury in
3 this proceeding will be presented and can decide all issues
4 regarding the Transfer, ownership of the Shares, what was the
5 correct amount that should have been paid to redeem the Shares
6 and YKF's shares in Smart Alec's, whether Triano has a lien on
7 the Shares, and whether Triano has allowable claims for
8 attorney's fees, secured or otherwise.
9

10 **C. This Court has jurisdiction over the Counterclaim.**

11 While Dodson would concede for purposes of the YKF Motion,
12 that she could not have, as a plaintiff jurisdictionally opened
13 the door to this Court, walked in and sued YKF for the \$90,000
14 that is the subject of the Counterclaim, the fact is that she did
15 not open that door. YKF opened the door when it sued Dodson.

16 In addressing the Complaint and her response thereto, Dodson
17 first had to consider the compulsory counterclaim rule under FRCP
18 13, incorporated by Bankruptcy Rule 7013. (Because Dodson has not
19 been sued by a bankruptcy trustee or debtor in possession, the
20 relief from compulsory counterclaims of Rule 7013 does not
21 apply.) Rule 13(a)(1), FRCP, requires a defendant to bring a
22 counterclaim against the plaintiff if the counterclaim arises out
23 of the same transaction or occurrence of the complaint. Here, the
24 transaction or occurrence of the Counterclaim is part of the same
25 factual chain starting with the Settlement Agreement and the
26 pledge of the Shares, leading to the Transfer, to the redemption
27
28

1 from YKF and to Dodson's forced overpayment to YKF. Thus, Dodson
2 could only withhold filing the Counterclaim at her peril.

3 Second, YKF, having started this litigation, which does not
4 impact the bankruptcy estate regardless of its outcome, should
5 not be heard to protest exercise of the supplemental jurisdiction
6 of this Court under 28 U.S.C. §1367(a). Such jurisdiction,
7 formerly known as pendent jurisdiction, allows this Court to
8 adjudicate a state law claim, as that raised by Dodson's
9 Counterclaim, if it is sufficiently related to a federal claim
10 properly before it.
11

12 The history of Smart Alec's shares of corporate stock
13 contains the names of the Debtor, YKF, Dodson and Triano. While
14 the Debtor has received a discharge, over Triano's unsuccessful
15 objection, his name is still being taken in vain by YKF and
16 Triano. What Dodson paid to Debtor on the front-end of this
17 history and whether that was too little, and what Dodson paid to
18 YKF on the back-end and whether that was too much, and whether
19 Triano's lien claim affects either YKF or Dodson or neither, are
20 the parts of the history Smart Alec's shares that should be
21 decided by this Court. Keeping all parts of the dispute and all
22 three of the disputants together lies within this Court's
23 discretionary exercise of supplemental jurisdiction.
24

25 YKF cites a Ninth Circuit case, *In re Pegasus Gold Corp.*,
26 394 F.3d 1189, 1195 (9th Cir. 2005), for the unremarkable
27 proposition that supplemental jurisdiction extends to claims that
28

1 are part of the same "common nucleus of operative facts." Dodson
2 and YKF agree on the law, but disagree on its application to the
3 facts. Dodson submits that the part of the history of the Smart
4 Alec's shares presented by the Counterclaims fits into, if on one
5 side, of the common nucleus of facts presented by the Complaint,
6 Counterclaim and Intervention Motion. And even if the Court were
7 to deny the latter, it would have, and should exercise,
8 supplemental jurisdiction over the Counterclaim.
9

10 **III. Conclusion.**

11 Based upon the foregoing, the Court should deny the YKF
12 Motion.
13

14 Respectfully submitted,

15 Dated: December 7, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

17 /s/ Joel K. Belway

JOEL K. BELWAY

18 Attorney for Stephanie Dodson
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DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. On December 7, 2007, I served the attached **Memorandum in Opposition to Motion to Dismiss Counterclaim** on the interested parties in this action by placing true copies thereof in sealed envelopes and transmitting said envelopes to the following addresses by the means indicated:

Via First-Class U.S. Mail

James S. Monroe, Esq.
Gregory E. Schopf, Esq.
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996

U.S. Trustee
235 Pine Street, Suite 850
San Francisco, CA 94104

Mark D. Byrne, Esq.
Triano & Byrne
25 Jessie Street
16th Floor
San Francisco, CA 94105-2749

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 7, 2007, at San Francisco, California.

\s\ Joel K. Belway

James S. Monroe, Esq. (State Bar Number: 102328)
Gregory E. Schopf (State Bar Number: 122862)
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Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER N. POPOV,

Debtor.

Case No. 05-32929

Chapter 7

YUGEN KAISHA, Y.K.F.,

Plaintiff,

v.

STEPHANIE DODSON,

Defendant.

Adv. Pro. No.: 07-03104

**YUGEN KAISHA, Y.K.F.'S OPPOSITION
TO DEFENDANT'S MOTION TO COMPEL
PLAINTIFF TO FURNISH SECURITY FOR
COSTS, AND RESPONSE TO MOTION TO
AMEND ANSWER**

Hearing

Date: December 21, 2007
Time: 9:30 a.m.
Place: Courtroom 23
Judge: Hon. Thomas E. Carlson

Yugen Kaisha, Y.K.F. ("YKF"), plaintiff in the above-captioned action, hereby submits this (i) opposition to the motion of Stephanie Dodson ("Dodson") to compel YKF to furnish security for costs on the grounds that the requirements for imposition of a bond under California Code of Civil procedure §1030 are not established, and (ii) response to Dodson's motion to amend her answer to the complaint.

OPPOSITION TO MOTION TO COMPEL PLAINTIFF TO
FURNISH SECURITY FOR COSTS; ADV. CASE NO. 07-03104

10836225.1

RESPONSE TO MOTION TO AMEND ANSWER

Dodson requests leave of court to amend her answer to the complaint to allege two new affirmative defenses – collateral estoppel and lack of capacity. As discussed below, neither of these proposed defenses has any conceivable applicability to this case.

Collateral Estoppel. YKF alleges in its complaint against Dodson that Alexander Popov (“Popov”) transferred his shares of stock in Smart Alec’s Intelligent Food, Inc. (“Smart Alec’s”) to Dodson shortly before the September 6, 2005 filing date of Popov’s bankruptcy petition with the actual intent to hinder, delay or defraud his creditors. Dodson seeks to allege as an affirmative defense that YKF is precluded from establishing that the shares were transferred shortly before Popov’s bankruptcy based upon an alleged determination by this court that the share transfer occurred on April 18, 2004 (the stated date of the share transfer agreement) in connection with the trial of Martin F. Triano’s (“Triano”) complaint objecting to Popov’s discharge based upon fraudulent concealment of assets. Collateral estoppel is clearly inapplicable to YKF on these facts since neither YKF nor the Chapter 7 Trustee was a party or in privity with a party to the Triano action. Moreover, the share transfer date was not even litigated in the Triano action and was instead stipulated to by Triano and Popov. Collateral estoppel is inapplicable in any event to issues that were not actually and necessarily litigated in the prior action.

Lack of Capacity. Dodson also seeks to add as an affirmative defense that YKF lacks the capacity to sue herein based on California Corporations Code §2203(c) which precludes a foreign corporation from maintaining an action in California state court in connection with intrastate business unless it qualifies to do business in California. However, even if §2203(c) were applicable to this action in principle, it clearly has no applicability to the transaction in this case since the mere purchase of an avoidance action from the bankruptcy trustee by YKF, a foreign corporation with no California presence, does not amount to the conduct of intrastate business within the meaning of §2203. A foreign corporation’s mere purchase of an asset from a resident of California is business done in interstate commerce, not intrastate commerce. *Charlton Silk Company v. Jones* (1923) 190 Cal. 341.

1 Notwithstanding the foregoing, YKF does not oppose Dodson's motion to amend her answer.
2 However, YKF does request that the court require Dodson to file an amended pleading which is
3 complete in itself as required by Bankruptcy Local Rule 1001-2(a)(26) and District Court Local Rule
4 10-1.

5 **OPPOSITION TO MOTION TO REQUIRE SECURITY FOR COSTS**

6 Dodson's motion for an order requiring YKF to furnish a \$25,000 undertaking for costs
7 should be denied. Even assuming, *arguendo*, that California Code of Civil Procedure §1030 is
8 applicable as Dodson contends, the requirements for imposition of a bond under this statute are not
9 established.

10 It is undisputed that YKF is a foreign corporation with no U.S. presence. Thus, the first
11 requirement of §1030(b) is satisfied.

12 The second element of §1030(b) requires Dodson to present evidence to establish a
13 "reasonable possibility" that she will obtain judgment on YKF's complaint. Here, Dodson's burden
14 to prove a reasonable possibility that she will obtain judgment has not been satisfied and, in fact,
15 Dodson has offered absolutely no evidence whatsoever to refute YKF's claims. Accordingly and on
16 this basis alone, the motion should be denied. *A. Farber & Ptnrs., Inc. v. Garber*, 417 F.Supp.2d
17 1143 (C.D. Cal., 2006).

18 Section 1030(b) also requires that the defendant submit an affidavit which sets forth the
19 nature and amount of the costs defendant has incurred and expects to incur. Here, the declaration of
20 Dodson's counsel merely states in very general terms that defendant may incur costs for expert
21 witnesses, possible travel expenses for depositions in Japan and North Carolina, and court reporter
22 fees, and then provides a guess that these expenses could be as much as \$25,000. This is an
23 insufficient showing of the nature and amount of costs actually expected to be incurred as required by
24 §1030(b). Moreover, Dodson's counsel provides no explanation regarding how the taking of
25 depositions of unspecified persons in North Carolina and/or Japan would have any conceivable
26 relevance to YKF's fraudulent transfer complaint.

1 Based upon the foregoing, YKF respectfully requests that Dodson's motion to compel YKF to
2 furnish security for costs be denied and for such other relief as the court deems appropriate.

3 Respectfully submitted,

4
5 Dated: December 11, 2007

NIXON PEABODY LLP

6
7
8 By: /s/ James S. Monroe

9 James S. Monroe
Attorneys for Yugen Kaisha, Y.K.F.

CERTIFICATE OF SERVICE

CASE NAME: IN RE ALEXANDER N., POPOV, Debtor;
ADV. PROCEEDING: YUGEN KAISHA, Y.K.F. v. STEPHANIE DODSON
COURT: U.S. Bankruptcy Court, Northern District of California
 (San Francisco)
CASE NO.: 05-32929-TC; Adv. Pro. No.: 07-03104-TC
FILE: 031405.000006

I, the undersigned, certify that I am employed in the City and County of San Francisco, California; that I am over the age of eighteen years and not a party to the within action; and that my business address is One Embarcadero Center, Suite 1800, San Francisco, CA 94111-3996. On this date, I served the following document(s):

YUGEN KAISHA, Y.K.F.'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO FURNISH SECURITY FOR COSTS, AND RESPONSE TO MOTION TO AMEND ANSWER

on the party stated below, placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

X : By First-Class Mail — I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

____ : By Certified Mail Service — I am readily familiar with the firm's practice for collection and processing of correspondence for Certified Mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with Certified Mail postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

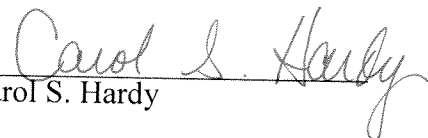
Addressee

Joel K. Belway
 THE LAW OFFICE OF JOEL K. BELWAY
 Professional Corporation
 235 Montgomery Street, Suite 668
 San Francisco, California 94104

United States Trustee
 San Francisco Division
 235 Pine Street, Suite 700
 San Francisco, CA 94104

Mark D. Byrne
 Law Offices of Triano and Byrne
 25 Jessie Street, 16th Floor
 San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 11, 2007, at San Francisco, California.


 Carol S. Hardy

James S. Monroe, Esq. (State Bar Number: 102328)
Gregory E. Schopf (State Bar Number: 122862)
NIXON PEABODY LLP
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E-mail: jmonroe@nixonpeabody.com

Attorneys for Plaintiff, Yugen Kaisha, Y.K.F.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER N. POPOV,

Debtor.

Case No. 05-32929

Chapter 7

YUGEN KAISHA, Y.K.F.,

Plaintiff,

v.

STEPHANIE DODSON,

Defendant.

Adv. Pro. No.: 07-03104

**REPLY TO DEFENDANT'S OPPOSITION
TO PLAINTIFF'S MOTION TO DISMISS
COUNTERCLAIM FOR LACK OF
SUBJECT MATTER JURISDICTION**

Hearing

Date: December 18, 2007
Time: 9:30 a.m.
Place: Courtroom 23
Judge: Hon. Thomas E. Carlson

Yugen Kaisha, Y.K.F. ("YKF"), hereby submits this reply to defendant Stephanie Dodson's ("Dodson") opposition to YKF's motion to dismiss her counterclaim filed herein for lack of subject matter jurisdiction on the grounds that there is no independent jurisdictional basis for the counterclaim under 28 U.S.C. §1334(b) and it falls outside the court's supplemental jurisdiction under 28 U.S.C. §1367(a).

1 In her opposition, Dodson tries mightily to obscure the issues in a vain effort to argue that the
2 complaint and counterclaim involve a common core of operative facts. However, a simple review of
3 the respective claims establishes that they involve neither the same facts nor the same applicable law.

4 YKF's complaint seeks to avoid and recover the debtor's prepetition transfer of 3,774,000
5 shares of common stock (the "Debtor's Shares") of Smart Alec's Intelligent Food, Inc., a California
6 corporation ("Smart Alec's") to Dodson as a fraudulent conveyance. YKF maintains that the
7 Debtor's Shares were transferred to Dodson shortly before the September 6, 2005 petition date with
8 the actual intent to hinder, delay or defraud the debtor's creditors by removing said shares from the
9 bankruptcy estate and thereby retaining control of Smart Alec's to the exclusion of the debtor's
10 creditors.

11 Dodson's counterclaim alleges a state law based contract claim regarding a Stock Redemption
12 Agreement, dated February 6, 2004, between Smart Alec's and YKF, whereby Smart Alec's agreed
13 to repurchase YKF's 1,440,000 shares of common stock of Smart Alec's (the "YKF Shares") for
14 \$775,000 as provided therein. On March 12, 2007, the balance due under the Stock Redemption
15 Agreement was paid to YKF and the YKF Shares were transferred to Smart Alec's. By her
16 counterclaim herein, Dodson alleges that YKF in some unexplained way delayed the payoff of the
17 amount due from Smart Alec's under the Stock Redemption Agreement, causing additional amounts
18 to have to be paid at the closing, and based thereon, seeks money damages from YKF.

19 Even if the counterclaim were properly maintainable by Dodson (which it is not since Dodson
20 is not even a party to the Stock Redemption Agreement upon which the counterclaim is based), the
21 counterclaim is clearly outside the bankruptcy court's supplemental jurisdiction under 28 U.S.C.
22 §1367(a) since the respective claims asserted in the complaint and counterclaim do not arise from a
23 "common nucleus of operative facts." *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1195 (9th Cir.
24 2005); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L.Ed. 2d 218 (1966).
25 The facts giving rise to Dodson's counterclaim (for breach of contract regarding YKF's post-petition
26 sale of its shares of Smart Alec's to Smart Alec's) are entirely different from the facts supporting
27 YKF's complaint (for avoidance of the debtor's prepetition transfer of his shares of Smart Alec's to
28

1 Dodson). The complaint and counterclaim bear no logical relation to each other and rest upon
2 different evidence and legal rights. Under these circumstances, the counterclaim is not within the
3 bankruptcy court's supplemental jurisdiction.

4 In her opposition, Dodson further attempts to obscure the issues by arguing that YKF's
5 purchase of the bankruptcy avoidance action which is the subject of the complaint is somehow
6 improper. However, Ninth Circuit decisions and case law clearly validate the bankruptcy trustee's
7 sale of avoidance actions and recognize that such a sale may often, as here, provide the greatest
8 benefit to the creditors of the bankruptcy estate. *Ducker Spradling & Metzger v. Baum Trust (In re*
9 *P.R.T.C., Inc.)*, 177 F.3d 774, 781 (9th Cir. 1999); *Briggs v. Kent (In re Prof'l Inv. Props. Of Am.)*,
10 955 F.2d 623, 625-626 (9th Cir. 1992); *Simantob v. Claims Prosecutor, L.L.C. (In re Lahijani)*, 325
11 B.R. 282, 288 (9th Cir. BAP 2005).

12 Based upon the foregoing, YKF respectfully requests that its motion to dismiss Dodson's
13 counterclaim be granted and for such other relief as the court deems appropriate.

14 Respectfully submitted,

15 Dated: December 14, 2007

NIXON PEABODY LLP

17 By: /s/ James S. Monroe

18 James S. Monroe
19 Attorneys for Yugen Kaisha, Y.K.F.

CERTIFICATE OF SERVICE

CASE NAME: IN RE ALEXANDER N., POPOV, Debtor;
ADV. PROCEEDING: YUGEN KAISHA, Y.K.F. v. STEPHANIE DODSON
COURT: U.S. Bankruptcy Court, Northern District of California
 (San Francisco)
CASE NO.: 05-32929-TC; Adv. Pro. No.: 07-03104-TC
FILE: 031405.000006

I, the undersigned, certify that I am employed in the City and County of San Francisco, California; that I am over the age of eighteen years and not a party to the within action; and that my business address is One Embarcadero Center, Suite 1800, San Francisco, CA 94111-3996. On this date, I served the following document(s):

**REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS
 COUNTERCLAIM FOR LACK OF SUBJECT MATTER JURISDICTION**

on the party stated below, placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

X : By First-Class Mail — I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

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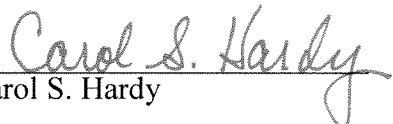
Addressee

Joel K. Belway
 THE LAW OFFICE OF JOEL K. BELWAY
 Professional Corporation
 235 Montgomery Street, Suite 668
 San Francisco, California 94104

United States Trustee
 San Francisco Division
 235 Pine Street, Suite 700
 San Francisco, CA 94104

Mark D. Byrne
 Law Offices of Triano and Byrne
 25 Jessie Street, 16th Floor
 San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 14, 2007, at San Francisco, California.


 Carol S. Hardy

JOEL K. BELWAY [60556]
 THE LAW OFFICE OF JOEL K. BELWAY
 Professional Corporation
 235 Montgomery Street, Suite 668
 San Francisco, California 94104
 Telephone: 415-788-1702
 Facsimile: 415-788-1517

Attorney for Defendant
 and Counterclaimant
 STEPHANIE DODSON

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:) Case No. 05-32929
)
 ALEXANDER N. POPOV,) Chapter 7
)
 Debtor.)

_____) A.P. No. 07-03104
 YUGEN KAISHA, Y.K.F., Plaintiff,)

vs.) **REPLY TO OPPOSITION TO MOTION**
) **TO AMEND ANSWER AND TO COMPEL**
) **PLAINTIFF TO FURNISH SECURITY**
 STEPHANIE DODSON,) **FOR COSTS**
 Defendant.)

_____) Date: Dec. 18, 2007
) Time: 9:30 a.m.
 STEPHANIE DODSON,) Court: Judge Carlson
 Counterclaimant,)

vs.)
)
 YUGEN KAISHA, Y.K.F.)
)
 Counterdefendant.)
 _____)

Defendant and counterclaimant, STEPHANIE DODSON ("Dodson"),
 submits this reply to the opposition of plaintiff and
 counterdefendant, YUGEN KAISHA, Y.K.F. ("YKF"), to Dodson's

1 motion (1) to amend her Answer to add the affirmative defenses of
2 lack of capacity and collateral estoppel, and (2) to compel YKF
3 to furnish security for costs (the "Motion").

4 **A. Motion to amend Answer.**

5 YKF's opposition first contends that, as to the defense of a
6 lack of capacity for failure to qualify to do business in
7 California, it is not doing business in California, but
8 ultimately states its non-opposition to the proposed amendment of
9 Dodson's answer (also to allege collateral estoppel), so long as
10 Dodson files an amended answer that is complete in itself. Dodson
11 will do so promptly.
12

13 Along the way to its non-opposition to the additional
14 affirmative defenses, YKF describes itself as a foreign
15 corporation with no California presence. Lest such an assertion,
16 important to the capacity issue, go unchallenged, let it be said
17 that if the following action's by YKF, disclosed upon the record
18 of this case already, do not constitute a California presence
19 (aside from anything else YKF may be doing or may have done in
20 California, subject to discovery), then perhaps YKF's position
21 will ultimately be upheld:
22

23 (1) investing \$720,000 in California in shares of Smart
24 Alec's Intelligent Foods, Inc. ("Smart Alec's"), a California
25 corporation that operates a single restaurant in on Telegraph
26 Avenue in Berkeley, California; then
27
28

1 (2) suing in the Alameda County Superior Court over that
2 investment through the same attorney's who represent it in
3 opposing the Motion; then

4 (3) settling that suit in February 2004 by a written
5 settlement agreement (Exhibit 1 to YKF's motion to dismiss the
6 counterclaim herein) (a) entered into in California, secured (b)
7 by a pledge in California of Smart Alec's shares and (c) by a
8 UCC-1 filing in Sacramento, California for Smart Alec's assets
9 and specifying California as the source of law for any disputes;
10 and then
11

12 (4) entering into a closing agreement with Dodson in March
13 2007 in California (Exhibit 2 to YKF's motion to dismiss the
14 counterclaim), specifying California law and calling for payment
15 by Dodson to YKF to the trust account of YKF's attorneys in San
16 Francisco (who represent YKF herein); then

17 (5) purchasing the avoidance rights sued upon herein from a
18 bankruptcy trustee in San Francisco, under an agreement entered
19 into in San Francisco and approved by this Court, sitting in San
20 Francisco; and then
21

22 (6) suing on the avoidance rights in a federal court in San
23 Francisco.
24
25
26
27
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B. Security for costs.**(1) Reasonable possibility of Dodson's prevailing.**

YKF opposes Dodson's request for security for costs on two grounds. First, it argues that Dodson has not presented evidence to establish a "reasonable possibility" that she will obtain judgment on YKF's complaint. Dodson requests that the Court, in making its assessment of whether she can show a reasonable possibility, which notably is less than either the "reasonable probability" required for injunctive relief or the "probable validity" for an attachment, take judicial notice of its own findings of fact and conclusions of law announced on the record at the end of the trial on March 27, 2007, in Triano v. Popov, A.P. No. 05-3485 (the "Findings"), which are attached hereto for the convenience of the Court.

The Findings, which are also incorporated into Dodson's Answer herein at paragraph 9 thereof, turn on the testimony of Debtor, Alexander Popov, and Dodson. That testimony, referred to in the Findings, dealt with the motives and background for the transfer of Debtor's residual interest in Smart Alec's shares that had been pledged to YKF. It is the same transfer that YKF in the complaint in this proceeding challenges as actually or constructively fraudulent. Dodson submits that the Findings reflect an existing judicial determination that she has a "reasonable possibility" of prevailing on YKF's complaint.

(2) Nature and amount of costs.

1 YKF next argues that the Motion has not sufficiently
2 demonstrated the nature and amount of costs defendant has
3 incurred and expects to incur. To date no costs have been
4 incurred, but if this matter goes forward, substantial costs may
5 be incurred.

6 First are expert witness fees, for either a court-appointed
7 expert or as part of discovery, see *Trepel v. Roadway Express,*
8 *Inc.*, 266 F.3d 418, 427 (6th Cir. 2001), for the valuation of the
9 Smart Alec's shares transferred and for the insolvency issue.
10 Such fees can, in the Court's own experience, be thousands of
11 dollars. Second, deposition transcripts and travel expenses will
12 run to thousands of more dollars if YKF refuses to make witnesses
13 available in San Francisco and Dodson is forced to fly counsel to
14 Japan or North Carolina or both. (YKF can solve that problem
15 simply: stipulate as part of a resolution of the Motion that
16 witnesses from Japan and North Carolina will be made available
17 deposition in San Francisco.)
18

19 YKF asks what conceivable relevance could the taking of
20 depositions of YKF's agents from Japan or North Carolina have to
21 a fraudulent conveyance complaint. If there were no other
22 relevance, the defense of YKF's lack of capacity, under
23 California Corporation's Code Section 2203, which is one of the
24 affirmative defenses the addition of which YKF has stated its
25 non-opposition, will require testimony and documentary evidence
26 from YKF, to show that it is and was doing business in California
27
28

and has not qualified in the State. Again, YKF can avoid the
travel expenses for those depositions costs by agreeing to
produce witnesses and documents in San Francisco, where its
attorneys work and where the court in which it chose to sue
Dodson is located.

Respectfully submitted,

Dated: December 16, 2007

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

/s/ Joel K. Belway
JOEL K. BELWAY
Attorney for Stephanie Dodson

DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. On December 16, 2007, I served the attached **Reply to Opposition to Amend Answer and to Compel Plaintiff to Furnish Security for Costs** on the interested parties in this action by placing true copies thereof in sealed envelopes and transmitting said envelopes to the following addresses by the means indicated:

Via First-Class U.S. Mail

James S. Monroe, Esq.
Gregory E. Schopf, Esq.
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, CA 94111-3996
(also via email to jmonroe@nixonpeabody.com
and by fax to (415)984-8300)

U.S. Trustee
235 Pine Street, Suite 850
San Francisco, CA 94104

Mark D. Byrne, Esq.
Triano & Byrne
25 Jessie Street
16th Floor
San Francisco, CA 94105-2749
(also by email to mailbox@martinftriano.com
And fax to (415)371-8001)

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 16, 2007, at San Francisco, California.

\s\ Joel K. Belway

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE THOMAS E. CARLSON, JUDGE

| | | |
|------------------|---|--------------------------------|
| In Re: |) | Case No. 05-32929-TEC-7 |
| |) | |
| ALEXANDER POPOV, |) | |
| |) | |
| Debtor. |) | |
| <hr/> | | |
| TRIANO, |) | Adv. 05-3485 |
| |) | |
| Defendant, |) | (Portion of proceedings:) |
| |) | <u>TRIAL: FINDINGS of FACT</u> |
| v. |) | <u>and CONCLUSIONS of LAW</u> |
| |) | |
| POPOV, |) | |
| |) | |
| Plaintiff. |) | Tuesday, March 27, 2007 |
| <hr/> | | |
| |) | San Francisco, California |

Appearances:

For the Plaintiff: Mark D. Byrne, Esq.
Law Offices of Martin F. Triano
25 Jessie Street, 16th Floor
San Francisco, California 94105
(415) 371-8000

For the Defendant: Joel K. Belway, Esq.
Law Offices of Joel K. Belway
235 Montgomery Street, Suite 668
San Francisco, California 94104
(415) 788-1702

Digital Court Recorder: United States Bankruptcy Court
Clerk of the Court
Jane L. Galvani
235 Pine Street, 23rd Floor (94104)
Post Office Box 7341
San Francisco, California 94120-7341
(415) 268-2366

Certified Electronic Transcriber: Palmer Reporting Services
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Stockton, California 95213-0727

Proceedings recorded by digital recording;
transcript produced by federally-approved transcription service.

Trial: Findings of Fact and Conclusions of Law

2

1 Tuesday, March 27, 2007

3:16 o'clock p.m.

2 P R O C E E D I N G S

3 THE COURT: Okay. I'm going to make a finding on one
4 issue here. I find on the basis of the evidence presented and
5 the plaintiff's offer of proof, taking that into account as it
6 established regarding the appraised value, which I think you
7 said in your brief, was 168,000 –

8 MR. [SPEAKER]: Correct.

9 THE COURT: – of the original interest?

10 On the basis of the facts that I've heard, the
11 plaintiff having stated that there's no further evidence to be
12 offered regarding the question of concealment or retention of an
13 interest, that the debtor did not retain an interest in this
14 property after the transfer.

15 First of all, I find that the transfer was effective
16 in April of 2004, April 18th, 2004. Although the purchase price
17 needed to be paid, the defendant, if there was, you know, a
18 fraudulent conveyance for too little money, et cetera, it was –
19 the die was cast then, because all that – all Ms. Dodson had to
20 do was pay that, the remainder of that limited sum of money.
21 And she had beneficial interest at that point or at least the
22 ability to get it at that price.

23 Second, and this is the most important, I find that
24 the debtor did not act as if he owned the property in any manner
25 after that date.

Trial: Findings of Fact and Conclusions of Law

3

1 First of all, there's this – been some evidence that
2 he did – had some activities at the restaurant. I find that he
3 had no real role in the restaurant. He did not manage the
4 restaurant. He do not decide what the menu was. He didn't say
5 what the hour was. He was hired; he was fired, et cetera. He
6 had been relieved of that – all those duties. And there was a
7 replacement in that role, namely Ms. Dodson.

8 He helped on a couple occasions in very limited
9 circumstances. He did so in part because of his friendship with
10 Ms. Dodson, which was quite evidently very real throughout this
11 whole time.

12 He also, although he didn't retain an interest in
13 ownership in the property, he did have an interest in its
14 success, because the restaurant's successful operation would –
15 was a means that he could – use to retire his guaranty
16 liability, his personal liability.

17 He never got any payment of money from the restaurant
18 either as a distribution as an owner, as an employee, anything
19 else like that. He did borrow against its value. There's just
20 no evidence that he acted as if he was the owner of the
21 restaurant.

22 That the debtor and Ms. Dodson were married some two
23 and a half years later doesn't change anything. They were quite
24 clearly friends during this period, but the fact that they had
25 dated before and were friends throughout and got married two and

Trial: Findings of Fact and Conclusions of Law

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1 a half years later is not by itself or even in conjunction with
2 everything else here enough evidence that there was a plan.

3 Most important here, I believe that the debtor's
4 explanation of why he transferred the property and that he
5 really did transfer the property is, is more credible, more
6 believable than the inference that he retained secretly an
7 interest in the property.

8 Why did he part with — why would he really part with
9 the property for this price to this person at this time?

10 First of all, because of his pledge which happened
11 shortly before, the restaurant, even if it had some real value,
12 didn't have any easily realizable value to him at that time,
13 because of the pledge and the need, the fact that all the cash
14 proceeds were going to be sucked out of this property for quite
15 some time. He couldn't use that value soon.

16 The shares— — these shares of — subject to this kind
17 of pledge in that kind of restaurant wouldn't be readily
18 salable. He needed money. He — he had lost his job a couple
19 months earlier by virtue of this settlement. He brought money
20 later from the — from Ms. Dodson. He needed some money.

21 Helping her was — was not — helping her succeed in the
22 restaurant was helpful to him. Giving her an incentive to work
23 hard was helpful to him. And — and doing something good for her
24 was not — didn't — he was very close friends with her. He had a
25 good relationship with her. And he would naturally want to help

Trial: Findings of Fact and Conclusions of Law

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1 her, even if he couldn't get something back later.

2 Now I am troubled to some extent by the fact that they
3 didn't disclose this transfer. I don't think that the failure
4 to disclose the transfer is a concealment of an interest, but it
5 is evidence that could be part of a plan to retain an interest
6 in the sense that if they never disclosed the transfer and
7 nobody ever caught them on anything, they could more easily
8 disavow it later.

9 But I think that that's not an overwhelming factor,
10 and I think is undercut by the fact that the evidence shows here
11 that they didn't disclose the transfer to YKF before the
12 bankruptcy was filed. And I think that that kind of behavior
13 would be inexplicable if they were trying to keep this transfer
14 a secret to just sort of ignore later.

15 The other thing that is at issue here is I don't think
16 this transfer makes sense as a secret transfer intended to stop
17 these creditors. It didn't stop the debtor's creditors in the
18 sense that his — as I understand from what I've heard in this —
19 in this trial here, the two major creditors who are Mr. Triano
20 and YKF.

21 YKF already had a superior interest in the shares.
22 Mr. Triano was again going after Ms. Dodson as well as Mr.
23 Triano. And she wasn't the most likely target to transfer any —
24 any interest in to get it away from Mr. Triano.

25 So it's not — it just doesn't look like a likely

Trial: Findings of Fact and Conclusions of Law

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1 scheme to keep this as a — as a method to keep this away from
2 creditors. But the key thing here is that this really doesn't
3 look like a retained interest. There was an activity that was —
4 that happened later that showed that the debtor really not only
5 nominally got rid of the interest, inexplicably got rid of the
6 interest, and then acted like he was an owner later.

7 I think, though, the last point to know that is, is
8 that to the extent they are married now is, is possibly relevant
9 only in one way. And that is it shows that, you know, that
10 their relationship turn into something that was very, very
11 close, indeed, over time. That may or may not have been in the
12 cards in 2004. Nothing certain in matters like that.

13 And the fact that they were married down the road is,
14 you know, in — in the context of all these other facts doesn't
15 show that that there was secret intent here. And the fact that
16 the debtor may, over time get some sort of a community-property
17 interest in this property by virtue of her efforts doesn't prove
18 anything, because those aren't conditions that existed during
19 the — the year prior to the filing. And, of course, she's
20 getting a community property interest in anything he earns, too.
21 That's the way marriage is.

22 Now without — without a finding that there's a secret
23 interest here, there can't be a concealment of an interest. He
24 doesn't have an interest. He didn't have an interest. The only
25 interest he has is what he may be earning as a result of, you

Trial: Findings of Fact and Conclusions of Law

7

1 know, these completely new events of marriage in which he's also
2 contributing his own labors to the community.

3 And if there is no retained interest, there isn't any
4 failure to — there isn't any concealment of it. And I have to
5 find for the — for the debtor.

6 I'm not so sure, going to the other question, that
7 there's a concealment anyway, because — I mean this whole
8 concept is very hard to apply where there's no disclosure and
9 nothing is done to sort of throw creditors off the trail. But I
10 don't want to rely on it, because I think if there was — I think
11 if there really was a secret transfer of property to somebody, a
12 legal transfer of property — let's take the case of — what was
13 the name of your case again, *Hughes*?

14 MR. BYRNE: *Hughes* and *Lawson*.

15 THE COURT: Yeah. If — if the debtor there had been
16 able, without recording, to give the mother a security interest
17 that would be superior to the judgment lien — of course, she had
18 to record there to — to get priority.

19 But if there had been some sort of transfer and then
20 she hadn't really meant it, I think it would still be a
21 concealment of an interest that was intended to throw the
22 creditors off, because even if they found it then they'd have to
23 sue the third party.

24 So I'm really not going to rely on the — on whether
25 there's a concealment here are not. I think that's kind of a

Trial: Findings of Fact and Conclusions of Law

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1 difficult concept to apply. This case isn't exactly like
2 Hughes, but I think that that isn't the difference. The real
3 problem here is, unlike Hughes, there was no activity that
4 evinced a retained interest in the property. That was present
5 in *Hughes*, and it's just not present here. I think he really
6 did get rid of it. Okay?

7 Mr. Belway, I'll do the — I'll do the form of
8 judgment. It's pretty simple to do. Okay?

9 MR. BYRNE: Thank you, Your Honor.

10 MR. BELWAY: Your Honor, thank you.

11 MR. BYRNE: Your Honor? For purposes of — I'll not
12 say we're going to do anything, but just for purposes of the
13 record, can we say that all the exhibits were entered in the
14 record or into the evidence?

15 THE COURT: Well, I certainly — I overruled the
16 objection on — the part of 16. I don't recall that there was
17 any — anything else that was objected to besides the one I dealt
18 with. I think they're all in.

19 Mr. Belway, am I missing something?

20 MR. BELWAY: 16 was the only one, I think, that didn't
21 get —

22 THE COURT: It was the first page of — the second
23 page —

24 MR. BELWAY: — the second page was 16.

25 THE COURT: — was 16. And I overruled your objection

Trial: Findings of Fact and Conclusions of Law

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1 on that. I think I overruled your objection on another thing.
2 The foundation for everything else was pretty obvious except the
3 second page of 16. And I'm letting that in because of the way
4 in which you've represented that you got it from the corporation
5 and their failure to bring the witness here. Okay?

6 [COUNSEL]: Thank you, Your Honor.

7 THE COURT: All right.

8 THE CLERK: All rise.

9 (Proceedings were concluded at 3:28 p.m.)

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State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate No. 00124. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.

Susan Palmer
Palmer Reporting Services

Dated April 14, 2007

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Attorney for Creditor Martin F. Triano

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

| | | |
|----------------------|---|------------------------------------|
| In re: |) | Case No. 05-32929 |
| ALEXANDER POPOV, |) | |
| |) | |
| Debtor |) | Chapter 7 |
| |) | |
| |) | |
| |) | Adv. Proc. No. 07-03104 |
| YUGEN KAISHA, Y.K.F. |) | |
| Plaintiff |) | NOTICE OF CONTINUED HEARING |
| vs. |) | DATE |
| STEPHANIE DODSON, |) | |
| Defendant. |) | |
| |) | Date: January 7, 2008 |
| |) | Time: 9.30 a.m. |
| |) | Court: Judge Carlson |
| STEPHANIE DODSON |) | |
| Counterclaimant |) | |
| vs |) | |
| YUGEN KAISHA, Y.K.F. |) | |
| Counterdefendant |) | |

1 NOTICE is hereby given that the hearing date in the above matter has been continued
2 From December 21, 2007 until January 7, 2008 at 9.30 a.m., Courtroom 23.

3
4 DATED:

LAW OFFICES OF TRIANO & BYRNE

5
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7
8 By: /s/ Carolyn N. Pettifer
9 CAROLYN N. PETTIFER, ESQ.
10 Attorney for MARTIN F. TRIANO
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ALEXANDER POPOV,
Debtor.

Case No. 05-32929

CHAPTER 7

Adv. Proc. No. 07-03104

CERTIFICATE OF SERVICE

YUGEN KAISHA, Y.K.F.,

Plaintiff,

vs.

STEPHANIE DODSON

Defendant

I am citizen of the United States, and a resident of the County of San Francisco; I am over the age of eighteen years, and not a party to the within action. My business address is 25 Jessie Street, 16th Floor, San Francisco, California 94105-2749. On December 7, 2007 I served the following documents:

///

///

- 1 • **REPLY TO YUGEN KAISHA, Y.K.F.'S OPPOSITION TO MOTION FOR**
- 2 **INTERVENTION BY MARTIN F. TRIANO DBA LAW OFFICES OF MARTIN**
- 3 **F. TRIANO; AND**
- 4 • **PROOF OF SERVICE.**

On the parties listed, addressed as follows:

5 JOEL BELWAY, ESQ.
6 235 MONTGOMERY STREET, SUITE 668
7 SAN FRANCISCO, CA 94104-2910

JAMES S. MONROE, ESQ.
NIXON PEABODY LLP,
ONE EMBARCADERO CENTER, 18TH
FLOOR
SAN FRANCISCO, CA 94111

9 **First Class Mail:** I am “readily familiar” with the firm’s practice of collection and
10 **XXX** processing correspondence for mailing. Under that practice it would be deposited with
11 the U.S. postal service to **JOEL BELWAY, ESQ.** and **JAMES S. MONROE, ESQ.**
12 the same day with postage thereon fully prepaid at San Francisco, California in the
13 ordinary course of business. I am aware that on motion of the party served, service is
14 presumed invalid if postal cancellation date or postage meter date is more one day after
15 date of deposit for mailing an affidavit.

16 **Facsimile:** By transmitting a true and correct copy via facsimile electronic equipment
17 transmission (fax) to (List names) at the fax number listed above.

18 **Personal Delivery:** By personally delivering the document(s) above to the person(s)
19 listed above at the address(es) on the date set forth above.

20 **Personal Delivery By Messenger:** By consigning the document(s) listed above to a
21 messenger for personal delivery to the following person(s) at the address(es) on the date
22 set forth above.

23 **Overnight:** By placing the document(s) thereof into envelope(s) bearing the name(s)
24 and address(es) of the person(s) to be served by Federal Express Delivery.

25 **STATE:** I declare under penalty of perjury under the laws of the State of California that
26 the foregoing is true and correct.

27 **XXX FEDERAL:** I declare that I am employed in the office of a member of the bar of this
28 Court at whose direction the service was made. I declare under penalty of perjury under
the laws of the United States of America that the foregoing is true and correct.

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1 I declare under penalty of perjury under the laws of the United States of America, that the
2 foregoing is true and correct. Executed on December 7, 2007 in San Francisco, California.

3
4 Respectfully Submitted,

Rithy Keo
Law Offices of Triano & Byrne
25 Jessie Street, 16th Floor
San Francisco, CA 94105

7 Dated: December 7, 2007

8 /s/ Stacey Arriola
9 STACEY ARRIOLA

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



Signed and Filed: January 04, 2008

A handwritten signature in black ink, appearing to read "T. E. Carlson".

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | | |
|----------------------|---|---------------------------|
| In re |) | Case No. 05-32929 TEC |
| ALEXANDER N. POPOV, |) | |
| |) | Chapter 7 |
| Debtor. |) | |
| YUGEN KAISHA Y.K.F., |) | |
| Plaintiff, |) | |
| vs. |) | Adv. Proc. No. 07-3104 TC |
| STEPHANIE DODSON, |) | |
| Defendants. |) | |
| STEPHANIE DODSON, |) | |
| Counter-Claimant, |) | |
| vs. |) | |
| YUGEN KAISHA Y.K.F., |) | |
| Counter-Defendant. |) | |

TENTATIVE RULING REGARDING (1) YUGEN KAISHA, Y.K.F.'S MOTION TO DISMISS COUNTERCLAIM AND (2) MARTIN TRIANO'S MOTION TO INTERVENE

The court is inclined to abstain in this action under 28 U.S.C. § 1334(c)(1) on condition that Defendant stipulate not to assert a statute-of-limitations defense to a state-court action

TENTATIVE RULING

1 filed on or before April 17, 2008 that raises identical claims.
2 The court believes discretionary abstention is in the interest of
3 justice because: (1) judicial economy favors the trial of YKF's
4 claim, Dodson's counterclaim, and Triano's claim in intervention in
5 a single forum; (2) YKF asserts that this court does not have
6 subject-matter jurisdiction over Dodson's counterclaim or Triano's
7 claim in intervention; (3) Dodson asserts a right to jury trial on
8 her counterclaim and this court will be unable to conduct a jury
9 trial without the consent of all parties; (4) abstention will not
10 delay the prompt administration of the bankruptcy estate because
11 the estate has no interest in the outcome of the claim asserted by
12 YKF; and (5) the YKF claim involves issues of state law as well as
13 federal law, and the counterclaim and claim in intervention involve
14 primarily, if not exclusively, state-law issues.

15 ****END OF TENTATIVE RULING****
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TENTATIVE RULING

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San Francisco, CA 94105

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



Signed and Filed: January 07, 2008

A handwritten signature in dark ink, appearing to read "T. E. Carlson".

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | | |
|----------------------|---|---------------------------|
| In re |) | Case No. 05-32929 TEC |
| ALEXANDER N. POPOV, |) | |
| |) | Chapter 7 |
| Debtor. |) | |
| YUGEN KAISHA Y.K.F., |) | |
| Plaintiff, |) | |
| vs. |) | Adv. Proc. No. 07-3104 TC |
| STEPHANIE DODSON, |) | |
| Defendant. |) | |
| STEPHANIE DODSON, |) | |
| Counter-Claimant, |) | |
| vs. |) | |
| YUGEN KAISHA Y.K.F., |) | |
| Counter-Defendant. |) | |

**CERTIFICATION FOR WITHDRAWAL OF REFERENCE AND ASSIGNMENT TO
DISTRICT JUDGE (BANKRUPTCY LOCAL RULE 9015(2)(b))**

Plaintiff filed an action to set aside a fraudulent conveyance under 11 U.S.C. §§ 544(b) and 548. Defendant filed a counterclaim asserting a breach of contract on which she properly demanded trial

**CERTIFICATION FOR WITHDRAWAL
OF REFERENCE**

1 by jury. Defendant does not consent to trial by jury before the
2 bankruptcy court. It appears that this court has subject-matter
3 jurisdiction over the counterclaim, and that the counterclaim
4 should not be dismissed. It appears further that the claim and
5 counterclaim will involve consideration and proof regarding many of
6 the same facts, and that judicial economy would be furthered by
7 trying them in a single action.

8 The court therefore certifies that the reference should be
9 withdrawn and the action assigned to a District Judge pursuant to
10 Bankruptcy Local Rule 9015-2(b).

11 The court does not address whether the motion to intervene by
12 Martin Triano should be granted.

13 ****END OF CERTIFICATION****
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CERTIFICATION FOR WITHDRAWAL
OF REFERENCE

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Gloria L. Franklin
Clerk of Court

San Francisco Bankruptcy Court
235 Pine St.
P.O. Box 7341
San Francisco, CA 94120-7341

(415) 268-2300

Richard W. Wieking, Clerk
United States District Court
450 Golden Gate Avenue
San Francisco, CA 94102-3489

FILED
JAN - 8 2008
UNITED STATES BANKRUPTCY COURT
SAN FRANCISCO, CA

Adversary Proceeding
07-3104 TC Thomas E. Carlson

Re: Yugen Kaisha Y.K.F. vs Dodson

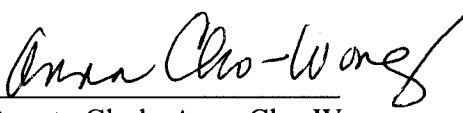
Dear Mr. Wieking:

[X] Enclosed please find a copy of the Order Certification For Withdrawal of Reference and Assignment To District Judge (Bankruptcy Local Rule 9015(2)(b). Included is a certified copy of the docket sheet and documents regarding subject matter counterclaim.

Please acknowledge receipt of this appeal by stamping the district court case number on a copy of this letter and return it to *United States Bankruptcy Court, San Francisco Division*.

Gloria L. Franklin, Clerk
United States Bankruptcy Court

Dated: January 8, 2008

By: 
Deputy Clerk Anna Cho-Wong